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AFTERWORD Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship Or Legal Scholars as Cultural Warriors

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AFTERWORD

BEYOND SEXUAL ORIENTATION IN QUEER LEGAL THEORY: MAJORITARIANISM, MULTIDIMENSIONALITY, AND RESPONSIBILITY IN SOCIAL JUSTICE SCHOLARSHIP

OR

LEGAL SCHOLARS AS CULTURAL WARRIORS

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INTRODUCTION

In this Afterword I situate this symposium against the past and present landscape of sexual orientation legal scholarship, seeking thereby to draw observations and arguments about the future of this field. Rather than focus on the preceding articles,[1] I juxtapose events of special significance to sexual orientation legal scholarship that have transpired since the founding of this discourse in a 1979 symposium by the *Hastings Law Journal*.[2] In particular, I consider three phenomena that came about immediately after, or since, the commencement of this field: (1) the contemporaneous emergence of critical race theory and postmodern methods of outsider jurisprudence during those same years; (2) the articulation of Queer[3] consciousness and activism at basically the same time; and (3) the onset, spread and impact of majoritarian cultural war. These developments, I argue, require sexual minority legal scholars to go beyond sexual orientation in the search for social and legal equality.

This Afterword also celebrates the remarkable coincidence that in a single year two symposia on sexual orientation and "intersexionality" were conceived, planned and held independently of each other.[4] This coincidence is remarkable because sexual orientation scholarship never before had witnessed any such effort—any programmatic effort to assess features of identity other than sexual orientation to evaluate how law affects this nation's multiply diverse sexual minorities.[5] Despite individ-

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1. The Foreword provides a more complete summary of the symposium articles. *See* Julie A. Nice, *Foreword: InterSEXionality and the Strategy Question*, 75 DENV. U. L. REV. 1131 (1998).

2. *See Sexual Preference and Gender Identity: A Symposium*, 30 HASTINGS L.J. 799 (1979).

3. I adopt the capital "Q" to underscore distinction with, and distance from, the "queer" as homophobic pejorative. The move to capitalize "Queer" responds to concerns over continuing associations with "queer's" disgraceful and traumatizing past. By distinguishing Queer from queer in this way, the move to capitalize invokes the shame of heterosexism while also underscoring that the refashioned term represents a willful act of sexual minority self-determination—an act taken through discursive reclamation and redeployment of the loaded term specifically and consciously on antisubordination terms. *See* Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 346–50 (1995).

4. *See* Symposium, *InterSEXionality: Interdisciplinary Perspectives on Queering Legal Theory*, 75 DENV. U. L. REV. 1129 (1998); Symposium, *Intersexions: The Legal and Social Construction of Sexual Orientation*, 48 HASTINGS L.J. 1101 (1997). Although the Denver symposium took place in February 1998, it was planned and assembled during 1997.

5. By "sexual minorities" I mean to highlight the diversity as well as the commonality of lesbians, bisexuals, the trans/bi-gendered and gay men. It is plain that "differences" exist across these various "sexual minority" populations. It also is plain that differences exist within these subgroups. Without disturbing recognition of those differences, or implying a false essentialism, it also is plain that commonalities exist within and across these subgroups on the basis of mistreatment due to the interplay of sex, gender and sexual orientation. Social and legal mistreatment on the basis of this complex interplay is the continuity that makes it coherent to approach these multiply diverse subgroups as a unit of social and legal analysis. Without reifying that mistreatment, the term "sexual minority" signifies a level of generality in the analysis of so-called "sexual aberrations" that is well grounded in the social circumstances and legal classifications established by the current preferences

ual or sporadic efforts to go beyond sexual orientation in gay and lesbian scholarship,[6] prior to 1997 critical legal inquiry into the condition of multiply diverse sexual minorities remained fixed substantially on "sexual orientation" as a unidimensional unit of critical legal analysis. This coincidence is made even more remarkable by two other developments of the same year.

Though not the focus of this Afterword, 1997 brought forth a program on sexual orientation, race and ethnicity during the annual meeting of the American Association of Law Schools.[7] That program, also a first, was sponsored jointly by the Association's Section on Gay and Lesbian Legal Issues and Section on Minority Groups in response to the lack of expansive critical analysis of the complex social and legal conditions that disempower sexual minorities legally, and that disadvantage us socially. That same year, an "internal racial critique" of gay and lesbian legal scholarship also emerged in full force.[8] This critique documented in compelling detail the absence of multidimensional analysis in sexual orientation legal scholarship, and persuasively explained the detrimental consequences of that absence.[9] In each instance, these developments have been overdue steps needed to secure the continuing development of sexual orientation discourse as a field of legal scholarship relevant to social life. This symposium and its 1997 counterparts, therefore, are a most welcome sign of this field's continuing vitality.

However, this vitality also means that scholars in this field must confront complex and difficult issues of identification, majoritarianism and responsibility in the advancement of antisubordination goals through critical legal scholarship. These issues stem in part from the need for solidarity and the fact of diversity within and among traditionally subor-

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or practices of majoritarian dominance—circumstances and classifications whose structuring we must discern as we inspect and endeavor to dismantle them. *See* Valdes, *supra* note 3.

6. *See, e.g.*, RUTH COLKER, HYDBRID: BISEXUALS, MULTIRACIALS, AND OTHER MISFITS UNDER AMERICAN LAW (1996) (examining the complexity of identiy intermixture across various sociolegal categories); Isabelle R. Gunning, *Stories from Home: Tales from the Intersection of Race, Gender and Sexual Orientation*, 5 S. CAL. REV. L. & WOMEN'S STUD. 143 (1995) (recounting personal and general encounters with Eurocentrism in lesbian venues or discourses); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263 (1995) (comparing and contrasting constructions of personal and community identities based on race and sexual orientation); Cynthia Petersen, *Envisioning a Lesbian Equality Jurisprudence*, *in* LEGAL INVERSIONS: LESBIANS, GAY MEN, AND THE POLITICS OF LAW 118 (Didi Herman & Carl Stychin eds., 1995) (arguing that lesbian legal theory must be intersectional because lesbian subordination is multifaceted); Darren Rosenblum, *Queer Intersectionality and the Failure of Recent Lesbian and Gay "Victories,"* 4 LAW & SEXUALITY 83 (1994) (questioning the benefits of lesbian and gay liberation to lesbians and gays who are of color, and/or poor, and/or trans/bi-gendered).

7. This program, titled "Race, Ethnicity and Sexual Orientation: Crossing New Intersections in Law and Scholarship," was held on January 9, 1998 during the Association's annual meeting in San Francisco, California.

8. *See, e.g.*, Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561 (1997).

9. *See id.* at 567–635.

dinated outgroups. As experience to date illustrates, the development of frameworks to embrace diversity and induce solidarity within and across outgroups is a difficult and delicate task.[10] Antisubordination progress therefore always will be uncertain, perhaps sometimes impossible. But as critical legal scholars devoted to the achievement of social justice for sexual minorities and other disempowered outgroups, we cannot evade the role we can play as legal scholars in a legalistic society.[11]

The importance of immediate context bears stress at the outset because it underlies the analysis pursued in this Afterword: to make a difference in legal culture and throughout society, antisubordination scholars must come to understand today's penchant for backlash lawmaking through cultural warfare as a continuing and concerted act of domination and subordination. Today's "cultural war" is a phenomenon that very much affects contemporary law and lawmaking in a society wedded to "government by law" and justified by the belief that its laws are presumptively just—and hence, justified—precisely because they are formally "democratic."[12] Yet the version of "democracy" that predominates in this country accommodates subordination through cultural war and backlash lawmaking because it valorizes and enforces majority self-interest, even while it problematizes majoritarian power when it verges on a formal, as opposed to a functional, form of cultural supremacy.[13]

In a close call, and on other occasions, prevalent forms of majoritarianism strongly caution against the use of judicial power to upset the arrangements put in place by those able to dominate the political

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10. *See generally* Francisco Valdes, *Latina/o Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 LA RAZA L.J. 1, 2–7 (1996) (outlining ousider experiments and experiences with diversity and community through critical legal theory).

11. By "legalistic" I mean simply a society that is highly devoted to "the rule of law" and that highly touts "equal justice under law." Without doubt, in this sense, this society is highly legalistic. *See generally* MARY ANN GLENDON, A NATION UNDER LAWYERS (1994) (discussing the legalistic spirit that has long been a hallmark of America's identity).

12. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980) (discussing the long-standing dispute in constitutional theory over the scope of judicial review).

13. The standard rule is that courts should defer to legislative majoritarianism unless a "suspect" classification is deemed to be involved in state action or unless state action impinges upon a "fundamental" interest. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 374–80 (4th ed. 1991). The purpose of this rule is to maximize majoritarianism and avoid the "countermajoritarian difficulty" that is attributed to judicial interference with majoritarian lawmaking. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962). Of course, the debate over "active" versus "restrained" exercises of judicial review is a much larger and complicated phenomenon, a full discussion of which is beyond this Afterword. For relatively recent expositions of this debate, see STEPHEN C. HALPERN & CHARLES M. LAMB, SUPREME COURT ACTIVISM AND RESTRAINT (1982); STERLING HARWOOD, JUDICIAL ACTIVISM: A RESTRAINED DEFENSE (1996). *See generally* Michael J. Klarman, *Majoritarian Judicial Review: The Retrenchment Problem*, 85 GEO. L.J. 491 (1997); Sylvia Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. (forthcoming 1999).

process.[14] This domination, both historically and presently, has constituted an essentialized form of identity-driven politics based on race, sex, religion, class, sexual orientation and other sociolegal axes.[15] Nonetheless, avoidance of the so-called "counter-majoritarian difficulty" is a venerable and continuing rationale for judicial deference even to unjust laws that favor essentialized majorities at the expense of essentialized minorities.[16] Thus, to succeed in lawmaking processes moved mostly by essentialized majoritarian self-interest, legal scholars must employ our skills and resources to imagine and help assemble collectivities with the capacity for successful participation in such lawmaking—at least until we are able to alter substantively these lawmaking dynamics. Through our scholarship and other activities, we must imagine and implement ways of mobilizing, practicing, harnessing and transcending identity politics to promote antisubordination transformation in a multicultural but majoritarian and essentialist society.[17]

This challenge, as just noted, is made acute and urgent by the resurgence of majoritarian cultural traditionalism, which followed on the heels of the 1979 symposium,[18] and continues today; since the triumph of backlash politics in the 1980 presidential election, judicial rollback of civil rights and "democratic" reconsolidation of majoritarian self-interest via legislation and referendum have become established as the political

14. A recent and especially germane example is *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Court curtsied to the "presumed belief of a majority of the electorate in Georgia," to uphold "majority sentiments about the morality of homosexuality." *Id.* at 196. Splitting 5 to 4, a bare majority held that "homosexual sodomy" did not constitute a "fundamental right," *id.* at 191–92, and then used the occasion to signal the arrival of a new era of judicial majoritarianism, warning lower courts and potential claimants that judicial discretion hence would side with majoritarian lawmaking preferences. *Cf. id.* at 194–95. Justice Powell, whose wavering switched outcomes several times during the course of the decision, finally cast the decisive vote that created a majority for that infamous ruling; ironically, several years later he publicly singled it out as a key instance of error during his time on the high bench. Anand Agneshwwar, *Powell on Sodomy: Ex-Justice Says He May Have Been Wrong*, NAT'L L.J., Nov. 5, 1990, at 3. Nevertheless, that pronouncement spawned similar rulings, in which lower federal courts held that lesbians and gays do not constitute a "suspect classification" to uphold state actions in which members of the sexual majority discriminated with impunity against sexual minorities. *See, e.g.*, Padula v. Webster, 822 F.2d 97, 102–03 (D.C. Cir. 1987). For critical reviews of these and similar rulings, see Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143 (1988); Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988); Nan D. Hunter, *Life After* Hardwick, 27 HARV. C.R.-C.L. L. REV. 531 (1992); Thomas B. Stoddard, Bowers v. Hardwick, *Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648 (1987); John Charles Hayes, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After* Bowers v. Hardwick, 31 B.C. L. REV. 375 (1990).

15. *See infra* notes 137–41 and accompanying text.

16. *See generally* BICKEL, *supra* note 13, at 16–23 (discussing the counter-majoritarian aspects of judicial review).

17. *See generally* Charles R. Lawrence III, *Foreword: Race, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819 (1995) (proposing a "transformative approach," which, in addition to remedying individual indignities, would focus on correcting group-level injustices).

18. *See infra* notes 83–94, 101–38 and accompanying text.

norm of these times.[19] This timing is telling; it tells us that, from its moment of origin, sexual orientation scholarship has been surrounded by majoritarian cultural war and essentialized backlash lawmaking directed against sexual and other minorities who somehow have reaped "too many" rights.[20] The key linkage pressed in this Afterword therefore is the relationship between antisubordination purpose through critical legal scholarship and backlash lawmaking through cultural war.

More specifically, this Afterword focuses on the ways in which legal scholarship devoted to social justice can be made more potent and relevant through multidimensional analysis.[21] This Afterword urges multidimensional legal scholarship as a promising means toward exploring and combating how sexual and other majorities exert lawmaking power through cultural war to perpetuate essentialized structural privileges. Multidimensionality in antisubordination critiques of law and society reminds "gays" or "women" or "blacks" or "Latinas/os" that the multiply diverse members of each such group at all times help constitute and complexify all of the other groups as well. Multidimensionality thereby

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19. The norms of cultural war and backlash lawmaking have become entrenched through various elections and developments spanning the 1980s and 1990s. *See infra* Part E (discussing three lines of majoritarian backlash lawmaking). This entrenchment continues despite the 1998 midterm elections, which have been interpreted as a rebuke of the extremism of backlash zealots in the Congress; perhaps most notable among those was Speaker of the House Newt Gingrich. *See, e.g.*, Howard Fineman & Matthew Cooper, *Newt Hits the Showers*, NEWSWEEK, Nov. 16, 1998, at 30, 30. Of course, the 1998 results also were attributed more specifically to public disgust with the pursuit of the Monica Lewinsky scandal to the point of formal presidential impeachment by politicians closely affiliated with ingroup backlash. *See* Daniel Klaidman & Mark Hosenball, *The Last True Believer*, NEWSWEEK, Nov. 16, 1998, at 36, 36. Of course, this election does not undo any of the tragedies wrought already by cultural war. And despite the electorate's apparent rebuke, majoritarian cultural warfare is unlikely to abate, as evidenced by post-election calls to redouble ingroup backlash efforts: these calls argue in part that 1998's electoral rebuke was not the result of public distaste for overzealousness, but, rather, a failure to honor sufficiently the imperatives of majoritarian backlash. These calls therefore urge intensification of practices and policies, such as the rollback of civil rights, that are likely to reconsolidate ingroup privileges, which have become the hallmark of cultural war. *See, e.g*, John Leo, *GOP: Stop Running Away from Majority Opinion*, MIAMI HERALD, Nov. 9, 1998, at 11A; *see also* Steve Berg, *Simmering Preferences Controversy Nears a Boil*, STAR TRIB. (Minneapolis-St. Paul), March 12, 1995, at 1A; Amitai Etzioni, *The Spirit of "We,"* ATLANTA J. & ATLANTA CONST., Jan. 16, 1994, at G1; *Too Many "Rights,"* NEWSDAY, Dec. 15, 1991, at 43.

20. *See generally* Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (discussing recent attempts by neoconservatives and critical legal scholars to undo civil rights reforms); *see also supra* note 19 and sources cited therein. In this symposium, Karen Engle examines one aspect of this retrenchment effort, exploring the conflation of "civil rights" and "special rights" by majoritarian legislators and judges to oppose the gay rights movement and the response to this conflation by gay rights proponents. *See* Karen Engle, *What's So Special About Special Rights*, 75 DENV. U. L. REV. 1265 (1998).

21. By "multidimensional" I mean a kind of multi-intersectional analysis and discourse that attempts cognition of multiple intersections at once. *See* Hutchinson, *supra* note 8, at 640–44; *see also* Berta Esperanza Hernandez-Truyol, *Building Bridges: Bringing International Human Rights Home*, 9 LA RAZA L.J. 69, 71 (1996); Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, Keynote Speech Before the Yale Law School Conference on Women of Color and the Law (April 16, 1988), *in* 14 WOMEN'S RTS. L. REP. 297, 298–300 (1992).

reminds all outgroups that *all* forms of identity hierarchy impinge on the social and legal interests of their members: biases based on race/ethnicity, sex/gender, sexual orientation and other identity features are directly relevant to each of those overlapping groups' social and legal interests because *all* of those biases impact members of *every* such group. Multidimensionality tends to promote awareness of patterns as well as particularities in social relations by studying in an interconnected way the specifics of subordination.

The emphasis throughout this Afterword on the relationship between critical legal scholarship and social justice transformation should not elide the equal importance of praxis to antisubordination method.[22] I focus on theory and scholarship in this Afterword chiefly because, as legal *scholars*, we possess a unique structural capacity for theorizing social reality and law's relationship to it: as *critical* legal scholars devoted to social justice, we have the responsibility to exercise that capacity to articulate frameworks of effective antisubordination resistance. But articulation is only the beginning; we also have a responsibility to practice and promote the lessons and insights of our scholarship. The responsibility of all social justice scholars without a doubt includes praxis.[23]

However, as with theory, praxis requires multidimensionality. And multidimensional praxis suggests that outgroup antisubordination interventions ranging from public lawyering to social activism should not be tied exclusively or simply to unidimensional essentialist formations, such as sexual orientation. Praxis—like theory and scholarship—should be cognizant of, and responsive to, the intra- and inter-group diversities and complexities addressed below with respect to theory and scholarship.

By responding to the gaps of the past in both theory and praxis, and by contributing momentum to the expansion of this scholarship at a critical juncture in its development, these twin symposia perform an invaluable service. By showcasing "intersexionality," 1997's symposia demonstrate how this scholarship can continue to mature. They invite and inspire more of the same in the years to come. Everyone associated with this field thus owes a debt of appreciation to the editors, authors and advisors of this symposium and its counterpart. In support of their efforts, the aim and purpose of this Afterword is to fortify this field of antisubordination scholarship as a key component in the continuing quest for equality, safety, justice and dignity on behalf of the multiply diverse sex-

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22. *See generally* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 828–29 (1997) (offering the beginnings of a critical race praxis to help bridge both the gap "between progressive race theory and political lawyering practice and the growing divide between law and racial justice").

23. This basic point has been well-established among RaceCrit and LatCrit scholars. *See, e.g.*, Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2248–51 (1992); Laura M. Padilla, *LatCrit Praxis to Heal Fractured Communities*, 2 HARV. LATINO L. REV. 375 (1997).

ual minorities that inhabit this nation, and that remain subordinated by its Euro-heteropatriarchal laws and norms.[24]

A. *Sexual Minorities & Sexual Orientation Scholarship Since 1979*

In 1979 the legal academy witnessed the first-ever symposium on sexual orientation and the law.[25] Since then this field of scholarship has progressed tremendously: this scholarship decisively has interjected sexual minority concerns into the consciousness and institutions of this nation's legal culture.[26] This scholarship has articulated nonheterosexist viewpoints in doctrinal domains from constitutional to family law that have exposed the heterocentric presumptions and prejudices that permeate this society and its legal system.[27] In conjunction with the work of activists and scholars in other disciplines, this intervention gradually but certainly has established the value and legitimacy of scholarly inquiry into an aspect of human existence and sociolegal interaction that previously had been denigrated as mere prurience or deviance.

But since then, and until now, our work on its face has for the most part reduced the lives and interests of sexual minorities virtually to a single factor: apart from exploring the interconnection of sex and gender to sexual orientation,[28] our scholarship has been unidimensionally fo-

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24. By "Euro-heteropatriarchy" or "Eurocentric heteropatriarchy" I mean the white, northern European, Anglo-Saxonized fusion of androsexism and heterosexism that combines these ideologies of identity to produce, and to sustain, white, male and straight privilege in law and society. This "Eurocentric" version of "heteropatriarchy" is rooted in ancient times and cultures that are posited as the antecedents of this society. *See* Francisco Valdes, *Unpacking Hetero-patriarchy: Tracing the Conflation of Sex, Gender and Sexual Orientation to its Origins*, 8 YALE J.L. & HUMAN. 161, 172–201 (1996). Though androsexism and heterosexism drive other societies and cultures as well, critical analysis is justifiably focused on the white and Anglo version because it is the one that predominates structurally in the society under discussion. In this particular version of heteropatriarchy, white and Anglo supremacy is a feature that distinguishes this country, for better or worse, from, say, the fusion of androsexism and heterosexism in a Spanish or Latina/o society. *See* Francisco Valdes, *Notes on the Conflation of Sex, Gender and Sexual Orientation: A QueerCrit and LatCrit Perspective*, *in* THE LATINO/A CONDITION: A CRITICAL READER 543 (Richard Delgado & Jean Stefancic eds., 1998). For further readings on the emergent field of "LatCrit" theory, see *infra* note 161.

25. *See* Symposium, *Sexual Preference and Gender Identity: A Symposium*, 30 HASTINGS L.J. 799 (1979).

26. For a critical synopsis of this field's development, see Francisco Valdes, *Queer Margins, Queer Ethics: A Call to Account for Race and Ethnicity in the Law, Theory and Politics of "Sexual Orientation,"* 48 HASTINGS L.J. 1293 (1997).

27. *See id.* at 1301–08.

28. The work on sex and gender, and their relationship to sexual orientation, has been spearheaded by a variety of scholars. *See, e.g.*, Elvia R. Arriola, *Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33 (1995); Elvia R. Arriola, *Gendered Inequality: Lesbians, Gays, and Feminist Legal Theory*, 9 BERKELEY WOMEN'S L.J. 103 (1994); Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); Marc A. Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511 (1992); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gen-*

cused on the social and legal significance of sexual orientation. Happily, this continuing exploration of sex-gender intersectionality continues in this symposium.[29] But since 1979, and until 1997, it was possible to read sexual orientation legal scholarship and walk away from that effort thinking that race, ethnicity, class, religion and other markers of identity and opportunity were marginal, if not irrelevant, to sexual minority lives.[30] It was possible, for the most part, to assume that the heterogeneous sexual minority population was comprised substantially of male, affluent WASPs; it was possible to conclude mistakenly that all was well in the lives of this nation's nonheterosexual population but for the exception of majoritarian sexual orientation bias.

This narrowed approach may be explained by developmental circumstance and other factors, including the operation of white and similar privileges in this society, well as within the legal academy and among lesbian and gay communities.[31] As a first step, this focus has been salutary because it has interjected into legal discourse a previously silenced but socially relevant community. But the discourse cannot be allowed to stall and remain there. This much has been made plain by the emergent internal critique of sexual orientation scholarship, which notes our collective failure to fan out beyond an overly simple or narrow focus on

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der, 144 U. PA. L. REV. 1 (1995); Valdes, *supra* note 3; I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158 (1991). This ongoing investigation is presaged in Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131 (1979), and, more recently, in Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

29. For example, Mary Anne Case, in her contribution to this symposium, continues prior explorations of sex, gender, and sexual orientation and their interaction under different cultural models. *See* Mary Anne Case, *Unpacking Package Deals: Separate Spheres Are Not the Answer*, 75 DENV. U. L. REV. 1305 (1998). Taking exception to comparative benefits I had attributed to Native American sex/gender arrangements elsewhere, Case argues that Native American arrangements at this point "would contract, not expand, our present horizons. [They] would do little more than substitute a package deal centered around gender for the one our culture has conventionally built around sex." Case, *supra*, at 1306; *see also* Valdes, *supra* note 3, at 209–300 (describing indigenous cultures' treatment of the sex/gender/sexual orientation model and comparing this to Euro-American constructs).

30. Based on the substantial analogy literature produced during those years, it also was possible to draw numerous analogies between sexual orientation and other categories of identity. *See, e.g.*, Odeana R. Neal, *The Limits of Legal Discourse: Learning from the Civil Rights Movement in the Quest for Gay and Lesbian Civil Rights*, 40 N.Y.L. SCH. L. REV. 679 (1996) (assessing the relevant similarities and differences in the use of race and sexual orientation civil rights analogies to address the failings of each movement); Sharon Elizabeth Rush, *Equal Protection Analogies—Identity and "Passing": Race and Sexual Orientation*, 13 HARV. BLACKLETTER J. 65 (1997) (analogizing race and sexual orientation in the context of the military's anti-gay exclusion policy); Margaret M. Russell, *Lesbian, Gay and Bisexual Rights and "The Civil Rights Agenda,"* 1 AFR.-AM. L. & POL'Y REP. 33 (1994) (comparing and contrasting sexual and racial minority civil rights quests to urge careful and mutually beneficial coalitional projects); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994) (examining and questioning analogies and distinctions between sexual orientation and other constructs, especially as used to promote anti-gay state referenda).

31. *See* Valdes, *supra* note 26, at 1315–18.

"sexual orientation" as the singular feature of personhood that eclipses all others in the social needs and legal experiences of sexual minorities.[32]

Moreover, that unidimensional construction, even if inadvertent, obviously never was demographically precise. All along, the nation's gay and lesbian communities have been beset by racism, sexism, poverty and other blights that have yet to be engaged in a sustained and critical way either by the legal academy or the nation's governing elites.[33] By necessary consequence, the scholarship since 1979 left virtually untouched the various other features and fields of identity that impact sexual minority lives, along and in conjunction with sexual orientation.

It follows from the record of mostly unidimensional inquiry produced since 1979 that the techniques and approaches of the past are less than is needed to rectify social injustice among sexual minorities that undeniably embody multiple diversities based on the interaction of race/ethnicity, trans/nationality, class, sex/gender, dis/ability, religion and other socially or legally relevant characteristics. Though momentarily feasible as antidiscrimination method in the early moments of sexual orientation scholarship, that narrow, unidimensional approach never could be mistaken as timeless. Today, the conception and articulation of equality analyses that center sexual minorities qua sexual minorities are important but nevertheless must be understood as insufficient, especially because much has changed jurisprudentially, politically and socially since 1979, both within and beyond the legal academy. As discussed more fully below,[34] these changes commenced formally, as if by lockstep, following the 1979 sexual orientation symposium, and they continue to unfold alongside the development of this field.

B. *Sexual Orientation, Critical Race Theory & Postmodern Analysis*

One change is the emergence and growth of outsider jurisprudence.[35] This discourse, devoted to social justice for traditionally subordinated groups, has been pioneered by women and men of color and of all sexual orientations. It offers much to sexual minority legal scholarship.

To ensure the relevance of the antiheterosexist social justice program launched in 1979, sexual minority (and other outgroup) scholars must transcend the limits of the single-axis past and embrace the jurisprudential methods and consciousness pioneered in recent years primarily by the women and men who formed the movement known as critical race

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32. *See* Hutchinson, *supra* note 8, at 583–635.

33. For critical analyses of these additional yet simultaneous afflictions, see *supra* note 6 and sources cited therein.

34. *See infra* notes 35–136 and accompanying text.

35. The term "outsider jurisprudence" was coined by Professor Mari J. Matsuda. *See* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989).

theory. A jurisprudential formation of even more recent vintage than gay and lesbian legal scholarship, critical race theory came into existence after the 1979 symposium—about ten years after, when law students and professors joined in various settings during the late 1980s to forge that movement.[36] But in its first decade, critical race theory has registered formidable insights that now can serve sexual orientation scholarship.[37]

Dedicated principally to antiracist struggle, critical race theory in its first decade has exposed the shortcomings of civil rights legal scholarship and social reforms anchored to formal rather than substantive change.[38] In doing so, critical race theory has devised tools and techniques of analysis that sexual minority scholars now should—must—adopt and apply to move beyond the gains and limits of the past. Chief among these innovations have been multiplicity[39] and intersectionality.[40] Both multiplicity and intersectionality grapple with the complexities of individual and collective identities as a social and legal phenomenon. They both seek to curb the use of "identity" to create social hierarchies, usually with the complicity of law. These two concepts, however, also respond and contribute to larger scholarly developments that span several disciplines and that, together, travel under the name of postmodernism.

Generally, "postmodernism" is the rubric associated with a recognition that social conditions and human understanding of them are complex, contingent and contextual.[41] Postmodernism therefore resists universal or unidimensional generalization, searching instead for the shifting details of nuance and particularity. It eschews ahistorical analysis and emphasizes the specificity of situations and the fluidity of perceptions. Postmodernism doubts categorization and demands qualification. It challenges the imputation of innateness to any human phenomenon and insists on documenting and critiquing the social construction of all realities. It accepts both the concentration and the diffusion of power, and the relationship of discourse to knowledge, consciousness and power. Post-

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36. For one historical account, see CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT at xvii–xxviii (Kimberlé Crenshaw et al. eds., 1995). For another account, see Sumi Cho & Robert Westley, *Historicizing Critical Race Theory's Cutting Edge: Key Movements that Performed the Theory*, *in* CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS (Jerome McCristal Culp, Jr. et. al. eds., forthcoming 1999).

37. *See generally* CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995) (providing a collection of essays examining critical race theory).

38. *See supra* notes 36, 37 and sources cited therein.

39. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 608 (1990); *see also* Matsuda, *supra* note 21.

40. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (1989); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–44 (1991).

41. *See generally* Anthony E. Cook, *Reflections on Postmodernism*, 26 NEW ENG. L. REV. 751 (1992) (evaluating whether progressive legal scholars can focus the philosophies of postmodernism toward the various purposes they envision).

modernism highlights the instability, indeterminacy and interplay of everything and, perhaps most of all, human identities and relations.[42]

In critical legal theory, postmodernism therefore stands in contrast to essentialism.[43] Although it describes various presumptions and practices, "essentialism" generally refers to discourses or projects that fail consciously or consistently to excavate the particularity and contingency of context and complexity in antisubordination critiques of legal relations and social hierarchies.[44] Unidimensional analyses of law and society therefore are described as essentialist while intersectional and multidimensional analyses that proceed from a postmodern perspective are described as antiessentialist.[45]

Responding to postmodern tenets, multiplicity signifies embrace of the fact that all humans embody simultaneously identities composed of multiple features, such as (but not limited to) sexual orientation, race, class and gender. Intersectionality complements multiplicity by recognizing that these multiple features interact, or intersect, in both structural and situational ways to produce multifaceted and multilayered, or multidimensional, social hierarchies. Thus, multiplicity recognizes the complexity of identities and intersectionality recognizes the concomitant complexity of power relationships based on multiplicitous identities. In tandem, these two concepts bring a postmodern and multidimensional mindset to the analysis of law, power and justice.[46]

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42. *See, e.g.*, Angela P. Harris, *Foreword: The Unbearable Lightness of Identity*, 2 AFR.-AM. L. & POL'Y REP. 207, 210–11 (1995).

43. *See generally* Robert S. Chang, *The End of Innocence or Politics After the Fall of the Essential Subject*, 45 AM. U. L. REV. 687 (1996) (exploring an analytical movement from essentialism to societal positions and political relationships).

44. The tensions of essentialism and postmodernism have attracted sexual orientation scholars' attentions. *See generally* Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL'Y & L. 43 (1994) (discussing the problem of essentialism within feminist legal theory, the effects of essentialism on lesbians, including the meaning and construction of lesbian experience, and questioning whether it makes sense to develop a specific lesbian legal theory separate from feminist legal theory); William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 YALE L.J. 333 (1992) (reviewing RICHARD A. POSNER, SEX AND REASON (1992)); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (suggesting that the pro-gay legal argument should focus not on immutability, but rather on the shared notions that adequately represent the self-conceptions of the essentialists and the constructivists); Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833 (1993) (discussing the constructivist debate and its implications).

45. This point is the thrust of the racial critique of sexual orientation scholarship. *See* Hutchinson, *supra* note 8, at 585 ("Gay and lesbian theorists embrace essentialism by excluding issues of race from [the] analysis.").

46. *See generally* Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1241 (1993) (sketching these points in the context of Asian-American legal scholarship).

As articulated within critical race theory, these concepts have focused mainly on the social and legal position of black women in antisexist and antiracist projects.[47] Multiplicity highlights that black women embody both a minority race and a minority sex in a social and legal culture that devalues both of these minority identities. Intersectionality highlights how the interplay of these devalued minority features combine to displace the interests of black women in antiracist and antisexist venues: black women are marginalized due to race in antisexist projects dominated chiefly by white women and in antiracist projects dominated mainly by black men. The combination of white privilege and male privilege in each venue thus marginalizes the social position and legal interests of black women in both antiracist and antisexist social justice ventures. In this way, multiplicity and intersectionality stress how single-axis or unidimensional approaches to social justice based on race/ethnicity or sex/gender are intrinsically and unduly self-limiting as antisubordination projects.

As applied to their original setting, multiplicity and intersectionality have been strikingly successful interventions. They have managed not only to produce new knowledge and to spawn a new discourse,[48] but also to affect for the better judicial approaches to antidiscrimination doctrine regarding women of color more generally.[49] But apart from isolated efforts,[50] these powerful concepts have not been extended by widespread use to other key domains of life and law where multiplicity and intersectionality also have significant value.[51] One such domain is legal scholarship on sexual orientation, which, until this year, has awaited a programmatic adoption of intersectional and multidimensional analysis to overcome the limits of single-axis approaches to social injustice on behalf of multiply diverse sexual minorities.[52] This belatedness, already odd in light of demographic sexual minority diversities and parallel jurisprudential developments, is made more anomalous by the emergence of Queerness *within* sexual minority culture and discourse in the few years immediately following the 1979 symposium.

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47. *See supra* notes 37–40 and accompanying text.

48. *See, e.g.*, Symposium, *Women of Color at the Center: Selections from the Third Annual Conference on Women of Color and the Law*, 43 STAN. L. REV. 1175 (1991); *see also* Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993).

49. *See, e.g.*, Lam v. University of Haw., 40 F.3d 1551, 1561–62 (9th Cir. 1994) (adopting intersectional analysis and applying it to the sex-and-race discrimination claim of an Asian woman).

50. *See supra* notes 6–8 and sources cited therein.

51. Ironically, one of these gaps has been within critical race theory itself, which on the whole has been internally inattentive to multiplicities and intersectionalities that implicate minority sexual orientation. For an analysis of this omission and its impact on critical race theory in light of the same social circumstances addressed in this Afterword, see Francisco Valdes, *Theorizing "OutCrit" Theories: Comparative Antisubordination Experience and Postsubordination Vision as Jurisprudential Method*, *in* CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS, *supra* note 36.

52. For a more detailed discussion of intersectionality's relative utility in sexual orientation social analysis and legal analysis, see Valdes, *supra* note 26, at 1333–40.

C. *Queering Sexual Orientation Legal Scholarship*

The move to intersectional and toward multidimensional analysis pioneered by critical race theorists—and now advanced and foreshadowed in sexual orientation scholarship by the 1997 symposia—is important because it expands the reach and insight of sexual orientation scholarship in the legal academy and beyond it. This move, and the expansive scope of critical inquiry that postmodern outsider methods make possible, are better suited to uncover insights that are likely to elude single-axis projects, which reduce sexual minority lives and interest to a single dimension—typically sexual orientation.[53] But the move toward multidimensionality is counseled by more than internal critique, demographic diversity and outsider jurisprudence. Multidimensionality is counseled as well by social changes within sexual minority culture, politics and discourse.

Within a few years of the 1979 symposium, a formation known as Queer identification was being constructed by sexual minority activists and theorists to emphasize multidimensional approaches to social relations from a resolutely nonheterosexual viewpoint.[54] Those theorists and activists constructed and proposed Queerness specifically as a formation that embraces antisubordination purpose *and* evinces multidimensional method.[55] While emanating from sexual minority opposition to compulsory heterosexuality, the Queer position was invented to counter from a consciously outgroup perspective the traditionalist assumptions and cultural practices of majoritarian self-interest across multiple categories of identity.

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53. Single axis approaches to social and legal issues may obscure various forms, levels or dimensions of relevant particularities. For instance, such analyses may overlook the distinction between "homo-sexual" and "homo-social" events, and related trans/cultural phenomena. In this symposium, Katherine Franke powerfully illustrates this point in her examination of "sex" and cultural notions of eroticism. Katherine M. Franke, *Putting Sex to Work*, 75 DENV. U. L. REV. 1139 (1998). Using ritualized semen practices in Papua, New Guinea and the brutal assault of Abner Louima by New York City police officers, Franke examines the effects of these concepts and their role in constructing and perpetuating power relations, and argues for the approach used by the International Criminal Tribunal for the Former Yugoslavia, which treats sex-related violence as the *actus reus* of other crimes, like torture or crimes against humanity, thereby avoiding the "essentialization of certain body parts and human behaviors as fundamentally sexual." *Id.* at 1143. In so doing, Franke resists single-axis conventions, extending her critique of these homo/sexualized events and phenomena to transnational realms of race, culture, ethnicity, and religion.

54. *See, e.g.*, Symposium, *More Gender Trouble: Feminism Meets Queer Theory*, 6 DIFFERENCES 1 (1994); Symposium, *Queer Subjects*, 25 SOCIALIST REV. 1 (1995); Symposium, *Queer Theory/Sociology: A Dialogue*, 12 SOC. THEORY 166 (1994).

55. *See generally* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY (Michael Warner ed., 1993) (presenting a collection of Queer theory, cultural studies and politics); Suzanna Danuta Walters, *From Here to Queer: Radical Feminism, Postmodernism, and the Lesbian Menace (Or, Why Can't a Woman Be More Like a Fag?)*, 21 SIGNS 830 (1996) (articulating a self-critical discussion of Queerness and its postmodern politics). For a discussion of Queerness and legal theory, see Valdes, *supra* note 3, at 344–77.

As crafted by the activists and scholars from other disciplines that to this day are its primary exponents, Queerness signifies a politically progressive subject position in scholarly and public discourse: "Being queer . . . means everyday fighting oppression; homophobia, racism, misogyny, the bigotry of religious hypocrites and our own self-hatred."[56] This Queer credo avows a broadly-conceived antisubordination stance that explicitly resists homophobic as well as other bigoted structures or practices. The multidimensionality of Queerness thus poises Queer analysis to confront the full range of Euro-heteropatriarchal tenets and biases, both throughout American society and within sexual minority communities.[57] These tenets include Eurocentric biases, including preferences for attributes associated with white and Anglo cultures or identities, that predominate in the sexual majority as well as among sexual minorities. These tenets also include patriarchal biases that prefer males and masculinity over females and femininity, whether in sexual minority communities or beyond them. Finally, these tenets include heterosexism, which valorizes cross-sex over same-sex desire, intimacy and bonding—tenets that prevail in society but that also swirl throughout sexual minority communities in the form of internal(ized) self-hate. As a set, these biases encapsulate white, male and straight supremacies to structure Euro-heteropatriarchal hegemony in American culture and society.[58] Queer multidimensionality stands purposefully in opposition to the multidimensionality of Euro-heteropatriarchy.

Consequently, Queerness is a formation for the times: it counsels intra- and inter-group egalitarianism while demanding social justice solidarity and responsibility. Its ideals gainfully can be adapted for employment in sexual orientation legal discourse to promote constructive scholarly engagement of diversity and postmodernity. Queer cultural activism and interdisciplinary theorizing therefore can provide the point of departure for articulating and practicing Queer *legal* theory as a form of multidimensionalized antisubordination praxis in sexual orientation sociolegal contexts.

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56. Anonymous Queers, *Queers Read This*, *in* LESBIANS, GAY MEN, AND THE LAW 45–47 (William B. Rubenstein ed., 1993).

57. The range is wide, indeed. *See generally Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508 (1989) (addressing an array of legal issues faced by gay men and lesbians); Brendan F. Crowe et al., *Current Developments in the Law: A Survey of Recent Cases Affecting The Rights of Gays, Lesbians and Bisexuals*, 3 B.U. PUB. INT. L.J. 379 (1993) (surveying recent cases involving issues facing gays, lesbians, and bisexuals); Standing Comm. on Lesbian and Gay Legal Issues, Soc. Responsibilities Special Interest Section, Am. Assoc. Law Libraries, *Sexual Orientation and the Law: A Selective Bibliography on Homosexuality and the Law, 1969–1993*, 86 L. LIBR. J. 1 (1994) (listing a bibliography of books, journals, symposia, films, legal organizations, and articles on the subject of homosexuality and the law).

58. *See supra* note 24.

If Queerness is practiced with fidelity,[59] the move to intersectional and multidimensional analysis in sexual orientation legal discourse may be tantamount to the move from single-axis "gay" and/or "lesbian" scholarship to a more expansive enterprise that may be denominated "Queer legal theory"; it is the move signaling scholarly recognition that a prospective abolition of sexual orientation discrimination would not terminate social injustice against sexual minorities based on race/ethnicity, class, dis/ability, sex/gender and other axes of social or legal status. It is the move from a reductionist or unidimensional anti*discrimination* scholarship to an intersexional and multidimensional anti*subordination* scholarship.[60] It is the scholarly move that this symposium, like its counterpart, heralds as the ideal and standard of the future in sexual orientation social justice scholarship.[61]

This move, however, cannot represent any relaxation of the focus on sexual orientation as a unique and urgent unit of antisubordination analysis, even as it becomes part of a multidimensional expansion in antisubordination scholarship and praxis. This precaution is underscored by another current event: the hate-murder of Matthew Shepard—a white, gay male college student—in Wyoming the year after these twin symposia were held. Matt's murder illustrates both the singularity and multidimensionality of homophobia and straight supremacy.[62]

Possessing both whiteness and maleness, Matt likely was sheltered from the ravages of white and male supremacy during his brief life. Unlike lesbians, female bisexuals, women and all sexual minorities of color,

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59. The articulation of Queerness remains controversial in part because it has been experienced as a white, male and bourgeois formation. *See generally* Valdes, *supra* note 3, at 356–60.

60. *See* Valdes, *supra* note 26, at 1311–13.

61. In this InterSEXionality Symposium, Martha Ertman takes this scholarly move to heart. *See* Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215 (1998). Examining her proposal for the implementation of premarital security agreements, Ertman addresses the multidimensional effects of that move: the potential results of undermining or entrenching compulsory heterosexuality; redefinitions of traditional gender roles and the effects on gender performativity doctrine; potential to reverse the current law's conflation of sex, gender, and sexual orientation; support for same-sex marriage; and responses to potential critiques regarding the maintenance of racial or class inequities. It is this measured, multidimensional approach that these recent symposia attempt to bring to the forefront of antisubordination scholarship, and is the approach I argue is a necessary component of effective antisubordination efforts now and, increasingly, in the future.

62. Consider the events surrounding his murder: Matt's alleged murderers are reported to have attacked two Latinos shortly after their fatal beating of Matt. The two Latinos fought back and repelled their assailants, who were arrested as a result of this incident. *See* Betsy Streisand et al., *A Death on the Prairie*, U.S. NEWS & WORLD REP., Oct. 26, 1998, at 22, 25. Persons who know the alleged assailants additionally reported to the media that Matt's alleged murderers were multidimensional bigots, known for expounding "stupid stuff about black people and gay people" as well as, apparently, attacking Latinas/os. Steve Lopez, *To Be Young and Gay in Wyoming*, TIME, Oct. 26, 1998, at 38, 39. The interplay of race, ethnicity, sex/gender and sexual orientation in the events and communities surrounding Matt's murder thus provide a contemporary case-in-point for multidimensional analysis of social and legal power relations. *See infra* note 69 and sources cited therein.

he likely reaped white *and* male privileges, as his physical and cultural features more likely than not buffered him from any extended or structural exposure to prevalent strains of racism and sexism: white supremacy and male supremacy. But those awesome identity privileges—arguably the most pervasive and entrenched of all social structures—were not enough to safeguard Matt's life, nor even his pursuit of happiness.[63] Despite the privileges of his race and sex, Matt was targeted for a horrific demise on the basis of his minority sexual orientation. Without doubt, our scholarship and activism must continue to labor for the protection of Matt and others like him among us, and to denounce those that try to deprive us—*any* of us—of life, liberty or happiness.

But our scholarship also must begin, finally, to show a similar and equal concern for others like Matt who do not share his privileges. And there are many such sisters and brothers among us: those who are nonwhite or nonAnglo or women or poor or disabled or noncitizens; those who are not Christian; those who are most noticeably gender-atypical; those who suffer from HIV and AIDS. Each of these identity categories represents many women and men who suffer the consequences of more social ills than simple homophobia,[64] and who therefore require more than the end of just homophobia to claim the benefits proffered in principle by this nation's formal commitments to liberty, equality and justice.[65]

Matt's brutal end thus reminds us that the privileges of race and sex cannot protect persons with a minority sexual orientation from social savagery. But the diverse demography of sexual minorities simultaneously warns us that the abolition of sexual orientation discrimination cannot protect all gays and lesbians from the ravages of sexism, racism, nativism, ethnocentrism, antiSemitism and other similar scourges of equality, justice, dignity and harmony.[66] This conjunction of death and

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63. For a now-classic exposition of both privileges, and the myriad settings in which they operate, see Peggy MacIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, *in* POWER, PRIVILEGE AND LAW: A CIVIL RIGHTS READER 22 (Leslie Bender & Daan Braveman eds., 1995); see also Devon W. Carbado, Straight Out of the Closet (unpublished manuscript, on file with author) (developing a similar connection between straight and white privilege from a black male heterosexual perspective). *See generally* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709 (1993) (arguing that whiteness and the associated privileges act as a continuing form of property interest). For additional critical readings on whiteness and its sociolegal impact, see *infra* note 99 and sources cited therein.

64. For a sampling of testimonials, see Valdes, *supra* note 3, at 359 n.1266. For critical analyses, see *supra* note 6 and sources cited therein.

65. These formal commitments oftentimes are honored in the breach, but majoritarian betrayal of national principles does not lessen the claim of outgroups to their fulfillment, even if belated and incremental. *See* Valdes, *supra* note 3, at 123 n.330.

66. Patricia Cain alerts us to the dangers of excluding trans/bi-gendered people from "sexual orientation" analyses by examining the lives of a number of transsexuals and showing us the importance of those lives to "our" issues. Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321 (1998). In this way, Cain underscores the diversity of "sexual minority" communities that suffer under heteropatriarchy. *See supra* note 5 (addressing diversity and commonality within "sexual minority" populations).

demography leads to the conclusion that underlies this symposium: no feature of identity safely can be cabined for isolated, unidimensional, decontextualized analysis within a Queer scholarship dedicated to anti-subordination transformation.

To serve the communities of multiply diverse sexual minorities that collectively form our diasporic tribes, we must craft agendas that reflect both the uniqueness and intricacy of sexual orientation as a category of social identity in a heterocentric and homophobic society. But in those agendas we also must account for our multiple diversities, and for the power of other identity bigotries that rage simultaneously within sexual minorities and throughout society. To do so, as Matt's killing also illustrates, Queer and allied scholars must begin paying more attention to another social change that has transpired since the 1979 symposium: the onset, spread and impact of cultural war. To understand our role as cultural warriors, Queer and allied scholars must begin to situate social justice legal scholarship within the current context of cultural traditionalism and majoritarian lawmaking through backlash identity politics.

D. *Cultural War, Cultural Traditionalism & Majoritarian Essentialism*

Though not subjected to hate and bigotry based on race or sex, Matt's life was robbed by the homophobia of our laws and lawmakers who, in his case, had refused several times to enact state and federal statutes designed to help protect Matt from his eventual fate.[67] Because the majoritarian governing elites of Matt's state and country declined to include sexual orientation in their hate crime statutes, they not only refused to protect the vulnerable among their people specifically from hateful murder and other bodily harms, they also indirectly signaled approval for the practice of sexual orientation bias in civil society.[68] Despite his majority privileges, Matt's majoritarian society thus failed him; his government, state and federal, in effect made Matt a more inviting target for both structural and individual majoritarian malevolence. It is no wonder that the media characterized Matt as a casualty of cultural war:[69] Matt's

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67. According to media reports, the Wyoming legislature rejected sexual orientation hate crime legislation at least three times. *See* Margaret Carlson, *Laws of the Last Resort*, TIME, Oct. 26, 1998, at 40, 40. No such federal legislation exists either. For instance, the Hate Crimes Prevention Act of 1997 was rejected just this year. *See* Hate Crimes Prevention Act of 1997, H.R. 3081, 105th Cong. Though hate crime statutes, like other criminal laws, cannot guarantee safety, they are important to the social structure and progress of a just society because they promote and protect norms of equality, dignity, and harmony.

68. These and similar acts of retrenchment help to re-legitimize bigotry, and to foster inequality. *See generally* Crenshaw, *supra* note 20 and accompanying text; Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (discussing the regressive effects of rulings that effectively validate racial discrimination); Yvonne L. Tharpes, Comment, Bowers v. Hardwick *and the Legitimization of Homophobia in America*, 30 HOW. L.J. 829, 830, 840–41 (1987) (noting that homophobic rulings validate social bigotry).

murder encapsulates the relationship between majoritarianism, lawmaking and sexual orientation scholarship in the midst of cultural war.[70]

The legislative failures preceding Matt's murder, like the killing itself, are far from isolated historical moments; they are encounters with ongoing repercussions in a cultural war being waged through majoritarian essentialism,[71] social terror, and formal legal process. This cultural war is unlike simple public controversy about the relative wisdom of one or another policy matter; it is a "war . . . for the soul of America," according to one leading ingroup warrior.[72] From that standpoint, waging cultural war has spawned a determined and conscious use of visceral hate and physical violence to emote and aggravate social division between ingroups and outgroups through the persistent and hyperbolic sloganeering of "wedge" issues;[73] these wedge issues, as the various lawmaking campaigns of this war have shown, tend to pivot for the most part on sociolegal identities and interests derived from sexual orientation, race/ethnicity/nationality, socioeconomic class and sex/gender.[74] This sharp-edged cultural war has bred a stridency toward lawmaking that professedly is justified by the "moral" imperatives of cultural tradi-

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69. The grisly murder sparked international attention. According to media reports, the victim was befriended in a straight neighborhood bar by two young men accompanied by their two girlfriends. They then beat him into unconsciousness, took him to a "rocky ridge just outside of town" and beat him again while he begged for his life. Lopez, *supra* note 62, at 39. They next strung him up to a nearby fence pole and left him hanging there in subzero weather. Matt was discovered about 18 hours later, and died several days later without regaining consciousness. *See* Richard Lacayo, *The New Gay Struggle*, TIME, Oct. 26, 1998, at 32, 33; Streisand et al., *supra* note 62, at 22, 24–25; *The Hate Debate*, NEW REPUBLIC, Nov. 2, 1998, at 7, 7–8; *see also* Andrew Gumbel, *Gay Man Beaten and Left for Dead in US*, INDEPENDENT (London) (Nov. 12, 1998), at 12.

70. The term "cultural war" refers to majoritarian reassertion of "democratic" lawmaking prerogative to reinvigorate cultural traditionalism throughout society, thereby containing or rolling back the practice of pluralism in American law and society. *See generally* JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991) (examining the historical significance and political implications of the cultural war in contemporary America). A declaration of cultural war was vituperated from the podium of the 1992 Republican National Convention by presidential contender Patrick J. Buchanan. *See* Paul Galloway, *Divided We Stand: Today's "Cultural War" Goes Deeper Than Political Slogans*, CHI. TRIB., Oct. 28, 1992, at C1; *see also* Black, *infra* note 72, at A12. The implications of this cultural war have been recognized by legal scholars for some time. *See, e.g.*, Kenneth L. Karst, *Religion, Sex, and Politics: Cultural Counterrevolution in Constitutional Perspective*, 24 U.C. DAVIS L. REV. 677 (1991); *see also* Aoki, *infra* note 83.

71. The discussion of majoritarian essentialism in cultural war is taken up further below. *See infra* Part E.

72. *See* Chris Black, *Buchanan Beckons Conservatives to Come "Home,"* BOSTON GLOBE, Aug. 18, 1992, at A12.

73. Wedge issues have become a standard feature of majoritarian electoral contests during the past decade or so. *See generally* Elaine Ciulla Karmack, *Nailing Down a Trap-Proof Platform*, L.A. TIMES, July 9, 1992, at B7 (describing the use of "family values" to foment wedge issues in the 1992 presidential election); *"Gay Rights," Public Prayer Are Two of the Most Divisive Social Issues*, SUN-SENTINEL, Oct. 14, 1996, at 12A (discussing sexual orientation equality as a wedge issue in the 1996 presidential election).

74. *See infra* notes 109–10, 124–26 and accompanying text.

tionalism,[75] but that has been executed with the plain aim of securing cultural supremacy as a matter of law and regardless of the human toll on outgroup communities.[76] This cultural war, unlike the usual policy controversy, consequently has encompassed meanspirited microagressions[77] and hate crimes, as well as backlash lawmaking, to stigmatize and beat back into submission—both literally and figuratively—outgroup persons and communities.[78]

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75. The moralism of majoritarian cultural war is determined largely by the fact that key majoritarian warriors identify as Christian fundamentalists with an evangelical passion for social policy; in effect, the mission of these warriors is to infuse public policy and social life with their preferred religious dogma through backlash lawmaking and cultural warfare. *See, e.g.*, Jeffrey H. Birnbaum, *Washington's Power 25: Which Pressure Groups Are Best at Manipulating the Laws We Live By? A Groundbreaking Fortune Survey Reveals Who Belongs to Lobbying's Elite and Why They Wield So Much Clout*, FORTUNE, Dec. 8, 1997, at 144, 144. *See generally* SARA DIAMOND, SPIRITUAL WARFARE: THE POLITICS OF THE CHRISTIAN RIGHT (1989) (providing a comprehensive account of the domestic and international political agenda espoused by Christian cultural warriors). Though beyond the scope of this Afterword, a corrollary to the analysis presented here is that cultural war also is about secularism versus sectarianism in this society. *See generally* Editorial, *Church, Politics, Abortion*, MIAMI HERALD, Nov. 21, 1998, at 24A (objecting to the "use of public office to translate church doctrine into general law").

76. For example, it is no coincidence, in this state of cultural war, that teenage suicide rates are highest among sexual minority teens; adolescence being the phase of maturation in which most humans, regardless of sexual orientation, identify themselves sexually, sexual minority teenagers tend to still lack the mechanisms for coping healthily with the omnipresent antipathy of institutionalized homophobia. *See, e.g.*, Lena H. Sun, *Gay Students Get Little Help with Harassment; Changing Attitudes, Court Decisions Prod Schools to Confront the Problem*, WASH. POST, July 20, 1998, at A1 (describing incidents of violence directed against sexual minority teenagers); *see also* Teemu Ruskula, *Minor Disregard: The Legal Constuction of the Fantasy that Gay Youth Do Not Exist*, 8 YALE J.L. FEMINISM 269, 270–73 (1996). Various studies over the years have concluded that sexual minority teens attemp suicide at higher rates than sexual majority teens, although these studies have been disputed because "there is no general agreement on . . . what constitutes a suicide attempt." Delia M. Rios, *Researchers Dispute Study on Gay Teen Suicide*, NEW ORLEANS TIMES-PICAYUNE, May 17, 1998, at A10. Nonetheless, no one disputes that young members of sexual minorities feel the impact of societal discrimination, including homophobia, even though their relative youth may not have prepared them to deal with it effectively. In addition, of course, the human toll of cultural war extends to harm inflicted on adults, harm that ranges from the physical and psychological to the social, legal and economic. *See, e.g.*, *infra* notes 78–82 and accompanying text. *See generally* JOHN D'EMILIO & ESTELLE B. FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA (1988) (examining the changing constructions of American conceptions of sexuality over the past 350 years and the resulting effects on individuals and society); HOMOPHOBIA: HOW WE ALL PAY THE PRICE (Warren J. Blumenfeld ed., 1992) (presenting a number of articles addressing the effects of homophobia on individuals, the homosexual community and society as a whole); JONATHAN KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 11–128 (1976) (documenting numerous instances and manifestations of harms against sexual minorities).

77. The term "microaggression" refers to everyday social slights that represent and replicate larger structures of subordination. *See* Peggy C. Davis, *Law as Microaggression*, 98 YALE L.J. 1559, 1560, 1565–68 (1989).

78. The connection between the ongoing cultural war against sexual minorities and Matt's demise was a notable feature of media reports. "Gay politics is more complicated now because what seems like an irresistible force of cultural change is meeting an immovable object of political resistance. For a long time, lesbians and gays have been defining themselves into the ordinary fabric of life. All the while, conservatives have been field-testing homosexuality as a defining issue for the Republican Party, especially for the next presidential election." Lacayo, *supra* note 69, at 34. Simi-

The hate crimes, microaggressions and other acts of violation, harassment, and stigma committed annually against sexual and other minorities during this cultural war menace daily the physical safety and social wellbeing of outgroups[79]—a feature of the social landscape that in turn helps to set the stage for supremacist identity politics in the more sanitized venues of formal lawmaking processes. Packaged in democracy and morality,[80] one undemocratic and morally questionable objective of this cultural war is to paralyze the personal realization and social manifestation of sexual minority identity, rendering sexual minorities socially dysfunctional and invisible both as persons and as groups.[81] In this cultural war, everything adds up to uncivil animus enacted, and embedded in the nation's sociolegal fabric, through the majoritarian prerogatives of formal democracy.[82]

This warfare has become increasingly institutionalized in government, politics and law since the formal triumph of essentialized backlash politics in the results of the 1980 presidential election.[83] Although politi-

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larly grisly hate murders of sexual minorities have been committed during this cultural war. *See, e.g.*, Valdes, *supra* note 3, at 254–56 & n.915.

79. *See generally* VALERIE JENNESS & KENDAL BROAD, HATE CRIMES: NEW SOCIAL MOVEMENTS AND THE POLITICS OF VIOLENCE 49–108 (1997) (discussing violence against sexual minorities and the enactment of anti-violence measures). Not surprinsingly, then, Matt's murder triggered a cascade of articles, editorials and columns on hate crimes and the pressing need for statutes designed to punish and stem them. *See, e.g.*, Bettina Boxall, *Long Arm of Hatred: Deadly Assault on Wyoming College Student Stunned People Across the Country, Reminding Many Southland Gays and Lesbians of Their Vulnerability to Attacks*, L.A. TIMES, Nov. 6, 1998, at B2; Jean Buchanan & Diane Carroll, *Recent Crimes Serve as Painful Reminder Homosexuals Face Fear of Physical Attacks on Daily Basis, Some Say*, KAN. CITY STAR, Oct. 14, 1998, at A1; Editorial, *A Tool Against Terrorism: Georgia Needs Laws to Fight Hate Crimes*, ATLANTA CONST., Oct. 19, 1998, at A6; Gregory Freeman, *Hate Crime Laws Are Necessary to Send Clear Message*, ST. LOUIS POST-DISPATCH, Nov. 3, 1998, at B1; Jose Martinez, *Climate of Fear Haunts Gays; Wyo. Murder Puts Anti-Bashing Laws on National Stage*, BOSTON HERALD, Oct. 18, 1998. This climate of cultural intimidation through physical and social violence of course prevailed before Matt's murder, and the media reported it periodically. *See, e.g.*, Robert L. Kaiser, *Gay Haven on Halsted Not Immune to Violence: Homosexuals Fleeing From Prejudice Find They are Targets*, CHI. TRIB., Sept. 28, 1998, at 1.

80. *See generally* Chai R. Feldblum, *Sexuyal Orientation, Morality and the Law: Devlin Revisited*, 57 U. PITT. L. REV. 237 (1996) (articulating two conceptions of equality to argue for legislation aimed at ensuring the equality of sexual orientation minorities).

81. *See* Francisco Valdes, *Acts of Power, Crimes of Knowledge: Some Observations on Desire, Law and Ideology in the Politics of Expression at the End of the Twentieth Century*, 1 IOWA J. GENDER, RACE & JUSTICE 213 (1997); *see also* David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 325–30 (1994); Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. REV. 915, 946–63 (1989); Douglas Warner, *Homophobia, "Manifest Homosexuals" and Political Activity: A New Approach to Gay Rights and the "Issue" of Homosexuality*, 11 GOLDEN GATE L. REV. 635 (1981).

82. *See generally* JAMES HUNTER: BEFORE THE SHOOTING BEGINS: SEARCHING FOR DEMOCRACY IN AMERICA'S CULTURE WAR (1994).

83. That election is viewed as the triumph of the straight, white, affluent man because that is the identity category that was favored in policy and lawmaking. For readings on the identity ideology and rhetoric of Ronald Reagan's election, see THE ELECTION OF 1980: REPORTS AND INTERPRETATIONS (Marlene Michels Pomper ed., 1981). For a discussion of critical legal scholar-

cians ranging from George Wallace to Richard Nixon had catered since the 1970s to the incipient sense of majoritarian backlash that eventually culminated in today's cultural war, the 1980 election was a watershed in the flow of identity politics in contemporary lawmaking: that election swept into power a president backed by savvy zealots dedicated to the "social agenda" of cultural traditionalism, which frankly favored traditionally dominant identity groups and heavily targeted sexual minorities, racial/ethnic minorities and women for social justice takebacks.[84] Rather than mark an ephemeral interlude in the gradual social progression of an enlightened and pluralistic society, 1980 marked the intensification of a brewing demand for retrenchment, which since then has been waged against the nation's "minorities" under the banner of "traditional values" and through a righteous but self-interested deployment of majoritarian power, rhetoric and ambition.

The continuation of that war, and its politics of self-interested cultural majoritarianism, were confirmed in the second pivotal triumph of backlash since the 1979 symposium: the 1994 election of a Congress to enact the agenda of social traditionalism embodied by the so-called "Contract with America" that served expressly as the platform of victory that year.[85] By 1994, the triumphant identity category was unabashedly calling itself the "angry white man"—just the sort of human to be seduced by slogans appealing to majoritarian essentialism to push the backlash agenda.[86] Since 1980, the essentialized identity politics of majoritarian cultural war have been introduced into all branches and levels of government, as well as into all processes of lawmaking, bearing both judicial and legislative social justice retrenchment in the name of traditional values.[87]

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ship and the backlash politics advanced and unleashed since then, see Keith Aoki, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996).

84. *See, e.g.*, ELIZABETH DREW, PORTRAIT OF AN ELECTION: THE 1980 PRESIDENTIAL CAMPAIGN 188–92, 342–43 (1981).

85. *See Inside Politics: Contract with America is Top Political Play of the Year* (CNN television broadcast, Dec. 23, 1994) (transcript #727-4), *available in* LEXIS, News Library, CNN file. This "contract" has been published as a book. CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (Ed Gillespie & Bob Schellhas eds., 1994). For analysis of the 1994 elections, see MIDTERM: THE ELECTIONS OF 1994 IN CONTEXT (Philip A. Klinkner ed., 1996) [hereinafter MIDTERM]; *see also* Evan Thomas & Rich Thomas, *A Guide to the First 100 Days*, Newsweek, Jan. 9, 1995, at 20 (examining the events immediately following the midterm elections).

86. *See, e.g.*, Grant Reeher & Joseph Cammarano, *In Search of the Angry White Male: Gender, Race, and Issues in the 1994 Elections*, *in* MIDTERM, *supra* note 85, at 125.

87. A contemporary legislative example especially germane to sexual minorities in the legal profession is congressional passage of the "Solomon-Pombo" amendment, also known as the "Solomon II" amendment, which denies certain federal funds to universities and law schools that prohibit military recruiters from using on-campus facilities. *See* 10 U.S.C.A. § 983 (1998); 32 C.F.R. § 216.4 (1997). This amendment was motivated by the specific intent to coerce retrenchment in law school antidiscrimination policies aimed at reducing sexual orientation bias: because the military formally discriminates on the basis of sexual orientation, those antidiscrimination law school poli-

This retrenchment is vitally important to Queer and allied *legal* scholars because it has been secured in large measure through the focused, methodical and determined reassertion of control over electoral contests, legal institutions and policy processes to impose cultural traditionalism by law throughout American society.[88] The social agenda of "traditional values" that essentialized and propelled majoritarian backlash both in the 1980 presidential election and in the 1994 congressional elections installed lawmakers on the basis *both* of majoritarian identity politics *and* formal commitment to the imposition of cultural traditionalism by law.[89] Though that agenda has only fitfully and partially been realized, judicial nominations and rulings began increasingly to reflect the demands of cultural traditionalism soon after the 1980 triumph of majoritarian backlash in much the same way that congressional representation and lawmaking became increasingly oriented to the same social agenda of "traditional values" after the second triumph in 1994[90]—as the 1996 flurry of backlash legislation well illustrates.[91] The invidious result of this ongoing cultural war is the institutionalization of a lawmaking environment pervasively and actively hostile to outgroup or "minority" interests.[92]

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cies had the effect of barring the military from on-campus recruiting of law students. For a detailed analysis, see Section on Gay and Lesbian Legal Issues, Amelioration Report and Recommendations, (Sept. 15, 1998); Section on Gay and Lesbian Legal Issues, Supplemental Report, On-Campus Military Recruiting—Balancing AALS Rules, Other Nondiscrimination Policies and the Solomon II Amendment, (Dec. 15, 1998). Early drafts of these reports are published in Francisco Valdes, *Solomon's Shames: Law as Might and Inequality*, 23 THURGOOD MARSHALL L. REV. (forthcoming 1999); *see also* Francisco Valdes, Justice Under Solomon: Sexual Orientation, the Spending Power and the Takings Clause (unpublished manuscript, on file with author). For accounts of similarly regressive judicial action, see *infra* note 130 and sources cited therein on doctrinal retrenchment.

88. *See generally* JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996) (addressing the role of think tanks and foundations in initiating conservative retrenchment in 1968 and propelling it to a national prominence in the mid-1980s).

89. *See generally supra* notes 83–86 and sources cited therein.

90. *See generally* LINDA KILLIAN, THE FRESHMEN: WHAT HAPPENED TO THE REPUBLICAN REVOLUTION? (1998) (reporting on the Republican freshman class of the 104th Congress).

91. For instance, the Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (Supp. II 1996) and 28 U.S.C.A. § 1738C (West Supp. 1998)), was passed to undermine preemptively the legitimacy of same-sex marriages that might be recognized under one or more state constitutions. *See infra* note 121 and accompanying text. Also notable among that year's legislation are the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2015 (codified as amended in scattered sections of 42 U.S.C.) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, 28 U.S.C.). These two enactments constrict public benefits available for communities of color at high risk of social ills—ills which in turn originate with, and continue to be exarcebated by, the existence and preferences of white supremacy in this country and its laws. *See generally* TOMAS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994) (setting forth the historical development of white supremacy in California). For additional critical readings in white privilege and power, see *supra* note 63; *infra* note 99.

92. *See infra* notes 102–36 and accompanying text (discussing three lines of backlash lawmaking—direct referenda, spending restraints, and the restaffing of the judiciary).

This political, legal and social drive for cultural traditionalism continues today, even after the 1998 midterm elections that were viewed by many as a public rejection of backlash zealotry.[93] As the most recent post-election calls of majoritarian warriors—urging intensification rather than rethinking of their supremacist efforts—indicate, no single election is likely to undo the cumulative impact of nearly two decades characterized by cultural war and majoritarian belligerence.[94] Though the fact of war signifies that the ultimate outcome of conflict remains unrealized, the 1998 elections do not overturn any of the sociolegal regimes already enacted and imposed via cultural war and backlash lawmaking.[95] Nor do they alter the zeitgeist of warfare. Until such time, antisubordination legal scholars must become, and remain, cultural warriors.

Thus, to be socially and legally relevant in these particular times, Queer and allied legal scholars must begin to appreciate how cultural war is not only a terror-backed contest for the "soul" of the nation, but more specifically a campaign being managed through the excitation and manipulation of majoritarian essentialism. By majoritarian essentialism I mean the evocation and exploitation of ingroup identifications based on race/ethnicity, socioeconomic class, sex/gender, religion, sexual orientation and other identity features to consolidate and galvanize structurally-dominant groups around an essentialized sense of self-interested backlash based on majority identities. The "majoritarian" character of this essentialism therefore does not refer exclusively or primarily to simple numerical advantage, but to the leveraging of accumulated social and economic power positions that empower and poise some social groups effectively to control the structures and levers of "democratic" lawmaking. And the "essentialist" character of this majoritarianism refers to the practice of occluding ingroup diversities to create through the slogans and jingles of "traditional values" a falsely homogenized sense of ingroup superiority, security and privilege, which in turn exaggerates ingroup feelings of common self-interest. Today's form of majoritarian essentialism, most recently captured in the image, agenda and celebrity of the "angry white male,"[96] essentializes and activates majority identifi-

93. *See supra* note 19 and sources cited therein.

94. Indeed, cultural war has brought into the open a vicious and mean spirited form of traditional majoritarian values. In the name of traditional sexual majority values, some Americans cheered the vicious murder of openly gay college student Matthew Shepard in Wyoming on October 12, 1998. *See supra* notes 62–70 and accompanying text (discussing the circumstances surrounding Matt's murder). One media report, for instance, describes "a Kansas minister with a website called *godhatesfags.com* ma[king] plans to do a grave dance at [Matt Shepard's] funeral." Lopez, *supra* note 62, at 38.

95. The forces of backlash continue to press retrenchment relentlessly even today. *See, e.g.*, Anne Gearan, *GOP Presidential Hopefuls Put to Test*, MIAMI HERALD, Feb. 5, 1999, at 8A (reporting a "litmus test" questionnaire that asks presidential aspirants questions such as, "Would you place a creche on the White House lawn if ordered to refrain from doing so by the Supreme Court?").

96. *See supra* notes 85–86 and sources cited therein.

cations to portray a solidarity of intra-majority sociolegal interests, even though all ingroups, like all outgroups, are multiply diverse across multiple axes of identity and interest.

For instance, even though news reports indicate that Matt's alleged murderers were not especially privileged in terms of, say, class,[97] the continual agitation of majoritarian essentialism and the surrounding cries of cultural warfare apparently emboldened them to kill brazenly in the name of ingroup privileges accruing from straight supremacy.[98] Even though Matt's alleged murderers may in fact have little net cause to celebrate personally the socioeconomic status quo, they apparently could claim, and wield with at least momentary impunity, the heady power of another privilege: straight supremacy based on sexual orientation. And, in fact, they did. Despite their seeming lack of elite status or overall social and economic prospects, those two men allegedly asserted through torture and murder an essentialized identity based on majority sexual orientation, flexing a privileged status structurally and normatively proffered to them under this society's identity hierarchies.[99]

The essentialization of sexual orientation and other identity axes to entice and intoxicate majority-identified persons and groups with the sensation of privilege thus equips majoritarian elites to catalyze their warriors, and to rationalize the perpetual oppression and abuse—and even the occasional murder—of their "othered" neighbors under the banner of cultural traditionalism. Through the rhetoric and mentality of cultural war, majoritarian warriors inflame essentialism among multiply diverse ingroups, inciting oppressive and socially divisive assertions of majority-identity privileges, even when the "average" ingroup person in fact does not (or may not) enjoy the privileges concentrated specifically in ingroup elites. Majoritarian essentialism, as our times attest, thereby enables the crude but potent "us" versus "them" wedge issues and strate-

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97. Though not detailed, news reports described one of the alleged murderers as "total redneck" and a "punk, like any other punk you see on the street" (characterizations offered by an acquaintance), and both also were described as "high school dropouts." Lopez, *supra* note 62, at 39. In addition, one was reported to be "awaiting sentencing for burglarizing a Kentucky Fried Chicken." *Id.* Though inconclusive, these images collectively hint at less than elite class status.

98. News reports of the murder suggest that Matt's beating, and then his being left "hanging on the fence on the rocky ridge just outside of town," evinced minimal concern for keeping the crime secret. Lopez, *supra* note 62, at 39. *See generally supra* notes 62, 69 (outlining the events surrounding and media coverage of Matt's murder). For this reason, *Time* described the crime as not only "unspeakably gruesome" but also "profoundly dumb." Lopez, *supra* note 62, at 39.

99. Of course, the attack on two Latinos following Matt's fatal beating was the exercise of another form of identity superiority—white privilege—based on race and ethnicity. *See supra* note 63 (citing sources addressing both white and male privilege). *See generally* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefancic eds., 1997) (providing collection of articles addressing "whiteness" and its implications and manifestations in history, the law, privilege, and cultural roles); STEPHANIE M. WILDMAN ET AL., PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCES UNDERMINE AMERICA (1996) (examining the existence and perpetuation of white privilege in the workplace, residential housing patterns, the media, law, and educational structures).

gies that backlash identity politicians have used throughout this cultural war to conscript essentialized consciousness among majority-identified ingroups for backlash lawmaking against "minority" outgroups. By "majoritarian essentialism" I thus mean the practice of elites *within* traditionally dominant ingroups to energize ingroup-identified persons around a social agenda of self-interested lawmaking based on the illusion of uniformity among "majority" identities and interests. The cultural war being waged today with majoritarian essentialism and through backlash lawmaking therefore is highly relevant to postmodern social justice legal scholarship.

Because the developments sketched[100] here have profound connections to law and lawmaking, the implications of these developments are directly relevant to *legal* scholarship—and especially so for legal scholarship devoted to social justice transformation. While fostering a harsh public climate conducive both to random and structural social intimidation, this cultural war, as outlined in more detail below, also is a systematic orchestration of majoritarian power—numerical, structural and economic—being marshaled and deployed specifically to arrest the civil rights progress of this century through a series of contemporary lawmaking campaigns concentrated methodically along three lines of simultaneous attack. To reassert majoritarian primacy, if not cultural supremacy, essentialized ingroup self interest has generated a form of backlash "democracy" along three lines of lawmaking attacks that interact to cut off fragile sociolegal life lines to some of the most vulnerable individuals and communities of the nation.

E. *Formal Democracy, Cultural War & Backlash Lawmaking*

In this ongoing war, (at least) three lines of backlash lawmaking seem to have emerged as majoritarian favorites, and sexual minorities appear as prominent (though not exclusive) targets in each line of attack. The first line is the organization of "direct" referenda that commandeer governmental regulation of sociolegal issues simply by counting ballots. The second is the surgically targeted exercise of federal (and state) spending powers to disembowel programs that might aid outgroup survival and empowerment. The third is the doctrinaire restaffing of the federal (and state) judiciaries with majoritarian ideologues, warriors and sympathizers. These three lines of attack, slowly but steadily put into place since 1980, have established the dominance of essentialized back-

100. The account unfolded in this Afterword does not attempt a comprehensive analysis of cultural war and electoral politics that effectuate backlash lawmaking. This account oversimplifies a much larger and complex phenomenon to distill its basic relevance to this symposium and the discourse it advocates.

lash as "democratic" lawmaking to wear down, if not destroy, sexual minority and other outgroup social justice quests.[101]

The first line of attack—classically majoritarian devices like "popular" referenda—has been employed since the 1979 symposium to legislate directly and definitively the impossibility or impracticability of social justice reform on sexual orientation.[102] These campaigns—in Oregon,[103] Colorado,[104] Hawaii,[105] Alaska,[106] Florida,[107] California[108] and elsewhere—have been designed to remove sexual orientation entirely from the universe of human or civil rights, much less social justice and transformation, by codifying a self-serving version of "traditional values" as formal law and cultural norm. While majoritarian cultural warriors eagerly pursue direct takebacks in race/ethnicity[109] and sex/gender[110] fronts

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101. *See infra* notes 102–36 and accompanying text (outlining the three lines of backlash lawmaking attacks on non-majoritarian positions).

102. *See, e.g.*, Symposium, *The Constitutionality of Anti-Gay Ballot Initiatives*, 55 OHIO ST. L.J. 491, 491–93 (1994); John F. Niblock, Comment, *Anti-Gay Initiatives: A Call for Heightened Judicial Scrutiny*, 41 UCLA L. REV. 153, 154–55 (1993); Note, *Constitutional Limits on Anti-Gay-Rights Initiatives*, 106 HARV. L. REV. 1905, 1905–06 (1993).

103. Illustrating that the outcome of cultural war is not a foregone conclusion, voters in Oregon rejected the base appeals of majoritarian warriors for their endorsement of homophobia by law in that state. *See, e.g.*, Lisa Keen, *Referendums and Rights; Across the Country, Battles Over Protection for Gays and Lesbians*, WASH. POST, Oct. 31, 1993, at C3. *See generally* Hans A. Linde, *When Inititative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993) (providing a constitutional analysis by the Senior Judge of the Oregon Supreme Court of the mis/use of majoritarian politics to formalize sexual orientation discrimination).

104. In Colorado, this use of state referenda to stymie sexual minority equality claims or gains was successful, but eventually produced the Supreme Court's contrary ruling in *Romer v. Evans*. 517 U.S. 620 (1996) (striking down on equal protection grounds Colorado's Amendment Two, which had amended via referendum the state constitution to prohibit any state entity from enacting any sexual orientation antidiscrimination policies); *see also* Colloquium, Romer v. Evans*: The Decision and its Impact*, 2 NAT'L J. SEXUAL ORIENTATION L. 1 (1996) (visited Dec. 23, 1998) <http://sunsite.unc.edu/gaylaw> (this journal is the nation's first on-line law journal); Suzanne B. Goldberg, *Gay Rights Through the Looking Glass: Politics, Morality and the Trial of Colorado's Amendment 2*, 21 FORDHAM URB. L.J. 1057, 1057, 1063–80 (1994) (recounting the legal activity following passage of Amendment 2). *See generally* David W. Dunlap, *Ruling Signals More Fights to Come*, N.Y. TIMES, May 21, 1996, at A21 (exploring the implications of the *Romer v. Evans* decision).

105. An anti-gay referendum was passed in Hawaii during the 1998 midterm elections, a reaction to judicial recognition of same-sex marriage rights. *See infra* notes 115 and 116 and accompanying text.

106. An anti-gay referendum also succeeded in Alaska in the 1998 midterm elections, and again in response to a nonmajoritarian judicial ruling. *See infra* note 117 and accompanying text.

107. In Florida, a measure was placed on the ballot, but then was struck from it by the state supreme court prior to the voting because the measure as drafted violated state law requirements for the presentation of policy questions to a mass vote. *In re* Advisory Opinion to the Attorney General—Restricts Laws Related to Discrimination, 632 So. 2d 1018, 1019–21 (Fla. 1994).

108. In California, this kind of majoritarian contest has been concentrated chiefly on the expression and reinstituionalization of racism, nativism, classism and sexism, rather than homophobia. *See, e.g., infra* notes 109 and 110 and sources cited therein (discussing the recent passage of ingroup propositions in California).

109. The anti-immigrant and anti-affirmative action initiatives of California exemplify these efforts, highlighting how public officials can be instrumental in whipping up majoritarian essentialism and fervor. For examinations of the California initiatives, see Ruben J. Garcia, *Critical Race*

as well, the use of backlash referenda in today's cultural war suggests a strategic choice of sexual orientation to draw a line against even bare, formal equality in the cultural sands of the land.[111] Cultural war has fo-

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Theory and Proposition 187: The Racial Politics of Immigration Law, 17 UCLA CHICANO-LATINO L. REV. 118 (1995); Kevin R. Johnson, *An Essay on Immigration Politics, Popular Democracy, and California's Proposition 187: The Political Relevance and Legal Irrelevance of Race*, 70 WASH. L. REV. 629 (1995); Jeffrey R. Marguiles, *Closing the Doors to the Land of Opportunity: The Constitutional Controversy Surrounding Proposition 187*, 26 U. MIAMI INTER-AM. L. REV. 363 (1995); Eva Jefferson Paterson & Erica J. Teasly, *California's Campaign for Equal Opportunity: A Response to Governor Wilson's Open Letter*, 15 ST. LOUIS U. PUB. L. REV. 85 (1995); Note, *The Constitutionality of Proposition 209 As Applied*, 111 HARV. L. REV. 2081 (1998). Illustrating the interplay of democratic and judicial politics in the advancement of cultural war, these majoritarian enactments in turn can be validated by ingroup judges when challenged by outgroups after their passage. *See* Coalition for Economic Equity v. Wilson, 122 F.3d 692, 699 (9th Cir. 1997) (upholding Proposition 209's civil rights takebacks specifically on majoritarian grounds), *cert. denied*, 118 S. Ct. 397 (1997); *see also* League of United Latin-American Citizens v. Wilson, 997 F. Supp. 1244 (C.D. Cal. 1997) (upholding in part, and striking down in part, various provisions of Proposition 187). For discussion of judicial retrenchment and its convergence with backlash referenda in the context of cultural war, see *infra* notes 127–36 and accompanying text.

110. Though backlash initiatives tend not to be framed vocally around gender, anti-immigrant and anti-affirmative action initiatives of course take back incentives to social justice based on gender as well as on race. *See, e.g.*, Kevin R. Johnson, *Public Benefits and Immigration: The Intersection of Immigration Status, Ethnicity, Gender and Class*, 42 UCLA L. REV. 1509, 1572–73 (1995). The social atmosphere of physical violence and microaggression associated with these referenda certainly extends to spheres in which gender is most salient. For instance, on October 23, 1998—sixteen days after Matt's fatal beating—the "seventh casualty of anti-abortion violence since 1993" was shot to death by a sniper. T. Trent Gegax & Lynette Clemetson, *The Abortion Wars Come Home*, TIME, Nov. 9, 1998, at 34, 34. At roughly the same time, "five [abortion] clinics in three states received powder-laced letters saying the recipients had just been exposed to anthrax," a deadly chemical agent. *Id.* Understandably, public discourse on sex/gender issues for some time has reflected concern over the fallout of cultural war and backlash identity politics. *See, e.g.*, SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991); Nancy Gibbs, *The War Against Feminism*, TIME, Mar. 9, 1992, at 50, 50–55. Consequently, social power and inequality are integral to sex/gender antisubordination legal discourse. For examples of the use of the concepts within antisubordination discourse, see AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY (Martha Fineman & Nancy S. Thomadsen eds., 1991); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW (1992); Elvia R. Arriola, *Law and the Gendered Politics of Identity: Who Owns the Label "Lesbian"?*, 8 HASTINGS WOMEN'S L.J. 1 (1997); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Elizabeth M. Iglesias, *Rape, Race and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869 (1996); Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991). Finally, the economic impact of democratic initiatives that do pass into formal law typically are likely to fall disproportionately on the poor within these identity outgroups, whether defined principally by racialized, ethnicicized and/or gendered relations. *See generally* Symposium, *The War on Poverty: New Perspectives*, 1 D.C. L. REV. 1 (1992) (addressing the successes and failures of legal protections of the poor); Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41; *infra* note 125 and sources cited therein (discussing the Legal Services Corporation).

111. Current federal law provides no general antidiscrimination protection on the basis of sexual orientation. *See supra* note 14 and authorities cited therein. For a review of rulings that deny antidiscrimination protection under federal law to sexual minorities, see Valdes, *supra* note 3, at

cused on sexual orientation as the issue through which the concept of de jure discrimination has been salvaged and revitalized.[112]

This stance is ominous, as it reintroduces into public affairs a notion repudiated by basic principles of equality: that human dignity, legal protection or social opportunity may be denied blanketly to individuals on the basis of mere membership in a disfavored identity group. Even the dominant wing of the current Supreme Court seemingly stipulates to the proposition that the Constitution's "simple command(s)" will not tolerate "individuals" being treated as "simply components of a racial, religious, sexual, or national class"[113]—yet this sort of invidious prejudgment based on sexual orientation identity is exactly what de jure inequality through cultural war and backlash lawmaking aims and achieves.[114] The revival of this invidious, supremacist notion is trained formally on sexual minorities today, but opens the possibility of similar formal stances against other outgroups in years and battles to come. This practice represents, implicitly at least, a substantive regression in the conception and trajectory of civil rights more generally.

Significantly, these supremacist sexual majority referenda continue with full force today: cultural war in Hawaii over a state supreme court vindication of same-sex marriage rights resulted in a proposed constitutional amendment being placed on the ballot for the 1998 midterm elections.[115] Passed by majority vote, the newly-amended state constitution now empowers the Hawaii legislature to amend the constitution and overturn the state supreme court.[116] A similar campaign also succeeded this year in Alaska; by a two-to-one margin, Alaskans voted to add to the state constitution a ban on same-sex marriage, an expression of majori-

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136–75. *See generally supra* note 28 (citing sources addressing sex and gender, and the relationship to sexual orientation). Of course, local and state laws and other antidiscrimination policies provide a patchwork of schemes that alleviate sexual orientation discrimination in specific locales or settings. *See* Valdes, *supra* note 26, at 1335.

112. *See* Frank Rich, *Protect All Families*, MIAMI HERALD, Jan. 14, 1999, at 25A (noting "the right's obsession with homosexuality" and linking it to a "take-no-prisoners culture war").

113. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 602 (1990) (O'Connor, J. dissenting, joined by Rehnquist, C.J., Scalia, J., and Kennedy, J.)

114. *See generally supra* note 57 and sources cited therein.

115. *See* Baehr v. Lewin, 852 P.2d 44, 67–68 (Haw. 1993). For a critical account of this ruling, see Danielle Kie Hart, *Same-Sex Marriage Revisited—Taking a Critical Look at* Baehr v. Lewin, 9 GEO. MASON CIV. RITS. L.J. (forthcoming 1999). The issues engaged in this litigation have been controversial within sexual minority circles. For an account by the leading sexual minority lawyer in that litigation, see Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567 (1995). For analyses of the potential repercussions of that litigation, see Barbara J. Cox, *Same-Sex Marriage and Choice of Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033; Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

116. *See* John Cloud, *For Better or Worse: In Hawaii, a Showdown over Marriage Tests the Limits of Gay Activism*, TIME, Oct. 26, 1998, at 43, 43. For a local post-election report, see Mike Yuen, *Same-Sex Marriage Strongly Rejected*, HONOLULU STAR-BULLETIN, Nov. 4, 1998, at A1.

tarian "outrage" that a state court had dared rule otherwise under the pre-1998 constitution.[117] As in "undemocratic" societies that this nation criticizes, these events illustrate how courts of law and constitutional provisions are manipulated or altered through cultural war to preserve ingroup privilege by force of law.

This resort to supremacist spectacle through majoritarian contest, in which essentialized majorities can taunt and overwhelm essentialized minorities in the name of democracy, has not always succeeded; sometimes voters rise above the base appeals of backlash initiatives, and sometimes the severity of these propositions makes even the dominant wing of today's Supreme Court recoil.[118] Nonetheless, these formally "democratic" spectacles spread cultural war from federal to state and local levels. They embroil state and local governments in cultural war to foreclose alternative social justice routes in the wake of the national government's capture by majoritarian backlashers.[119] Since 1980, lawmaking by backlash referendum has emerged as a fearsome and exhausting maneuver of cultural war, used effectively to circumvent and trump the reluctance of governmental bodies or officials to lash out affirmatively at sexual minority and other outgroup communities.

The second line of attack—the targeted exercise of the spending power—spans numerous legislative enactments that fund and/or defund programs specifically to hurt sexual and other minorities across a wide range of social issues. For example, governmental spending power has been used successfully since the 1979 symposium to withdraw and deny support for expression and performance by sexual minority artists, and as a way of suppressing sexual minority social visibility and denouncing publicly sexual minority culture and production of culture.[120] Similarly, the Defense of Marriage Act embraces the exclusion of sexual minorities from federally-controlled social, legal and economic benefits that inhere by law in formal marriage.[121] Funding for the HIV-AIDS pandemic, a

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117. For a contemporary, local account, see Liz Ruskin, *Gay Marriage Ban Approved*, ANCHORAGE DAILY NEWS, Nov. 4, 1998, at A1.

118. Perhaps the most notable example of ultimate failure was Colorado's Amendment 2, which was approved by mass vote but failed to pass muster either before the Colorado Supreme Court or the United States Supreme Court. *See generally supra* note 104 (discussing Colorado's Amendment 2).

119. *See generally* Justice Shirley S. Abrahamson, Divided We Stand: State Constitutions in a More Perfect Union (Nov. 14, 1990), *in* 18 HASTINGS CONST. L.Q. 723 (1991) (addressing search and seizure, free speech, and education in the context of state constitutions); Paula Brantner, Note, *Removing Bricks from a Wall of Discrimination: State Constitutional Challenges to Sodomy Laws*, 19 HASTINGS CONST. L.Q. 495, 509–21 (1992) (examining the shift from a reliance on the federal Constitution to state constitutions in challenges to state sodomy laws following the *Hardwick* decision).

120. *See, e.g.*, Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. 1499, 1534–35 (1996).

121. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). *See generally* Evan Wolfson & Michael F. Melcher, *DOMA's House Divided: An Argument Against the Defense of*

gay-associated yet global health care crisis that erupted in the early 1980s alongside the rising tide of backlash, likewise has been belittled and neglected by legislative and budgetary mandarins since the onset of the plague, while funding for research and care remains today a contested federal priority.[122] More recently, the federal spending power has been used under the "Solomon II" amendment to mandate a loss of federal funding for student financial aid at law schools that deny on-campus access to at least one employer that discriminates both by policy and practice on the basis of minority sexual orientation: the United States Armed Services.[123] And, as with the organization of referenda, majoritarian misuse of governmental spending to wage cultural war is not targeted exclusively at sexual minorities; in this respect, as well as in others, control over the spending power extends to backlash lawmaking against outgroups based on race/ethnicity,[124] socioeconomic class[125] and sex/gender[126] as well.

Marriage Act, 44 FED. LAWYER 30 (1997) (arguing that DOMA fails to comply with several provisions of the Constitution); Scott Rusday-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997) (arguing that DOMA impermissibly "nullifies" the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1).

122. Governmental non/responses to the HIV-AIDS pandemic have been critiqued from various quarters. *See, e.g.*, RANDY SHILTS, AND THE BAND PLAYED ON: POLITICS, PEOPLE, AND THE AIDS EPIDEMIC (1987); Jean Reith Schroedel & Daniel R. Jordan, *Senate Voting and Social Construction of Target Populations: A Study of AIDS Policy Making, 1987–1992*, 23 J. HEALTH POL. POL'Y & L. 107, 116–27 (1998). *See generally* GLOBAL AIDS POLICY (Douglas A. Feldman ed., 1994).

123. *See supra* note 87 and sources cited therein.

124. Reinforcing the withdrawal of access to public goods effected through backlash referenda, *see supra* notes 111–19, legislative fiscal attacks against communities of color include the barrage of backlash statutes passed in 1996, on the heels of majoritarian victories in the 1994 midterm elections, which jointly deprive federal aid to many persons and communities in socioeconomic distress caused, in large part, by the legacies of racism, nativism, sexism or classism. *See supra* note 91 and sources cited therein.

125. The poor of all races, ethnicities, sexes and sexual orientations have been targeted for cultural war, in part by making them less able to exercise legal agency to pursue claims to rights. For instance, in 1997 and 1998 new regulations and legislation prohibited the Legal Services Corporation from filing class actions suits, or engaging in lobbying on behalf of welfare recipients, prisoners, migrant laborers and other vulnerable groups. 42 U.S.C.A. § 2996f(b) (1994 & Supp. 1998) The agency also is forbidden to provide any legal assistance in criminal proceedings, or in any proceeding to safeguard abortion rights, or in any proceeding to desegregate public schools. *Id.* In the past, legal services lawyers have been able to help poor persons vindicate some of these rights, but its budget has been slashed and its mandate has been contracted progressively since the 1980s, making this agency a less effective vehicle of social justice for the economically disadvantaged. *See generally* Talbot "Sandy" D'Alemberte, *Tributaries of Justice: The Search for Full Access*, 25 FLA. ST. U. L. REV. 631, 635–36 (1998) (discussing the decline in Legal Services Corporation funding); Douglas J. Besharov & Paul N. Tramontozzi, *Background Information on the Legal Services Corporation*, *in* LEGAL SERVICES FOR THE POOR: TIME FOR REFORM app. A, at 209–25 (Douglas J. Besharov ed., 1990) (setting forth the legal, eligibility, funding, and procedural requirements of the Legal Services Corporation); Stephen Loffredo, *Poverty, Democracy, and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993) (arguing against the judicial relegation of the poor to the "rationality" standard inquiry); *supra* note 110 and sources cited therein on poverty law and social justice.

126. An early example in this identity category is the Hyde Amendment, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976) (codified as amended at 42 U.S.C. § 1396a (1994)) which cut off Medicaid funds to women in search of an abortion, and which has been revised and reenacted every

In these and other instances, majoritarian cultural elites have used their essentialized warriors actively to redirect governmental spending, aiming deliberately to dehumanize, stigmatize and invisibilize the nation's sexual and other minorities in both material and symbolic terms. The misuse of federal economic clout to dictate specifically sexual orientation inequality in various social settings seeks not only to obstruct the diffused experiments of varied institutions toward the ideal of a bias-free sociolegal environment, this misuse effectively seeks to coerce affirmative societal complicity in homophobic, indeed antihuman, beliefs and practices that work constantly to sow instability among sexual minority individuals, families and communities. The misuse of the federal spending power since 1979 confirms that cultural war and backlash lawmaking are bent on the sociolegal devastation and permanent repression of Queer and other outgroup life both in "public" and "private" sectors of society.

The third line of backlash attack—the reconfiguration of courts and doctrines—also has been pursued aggressively since 1979. Even though federal courts have been (and once again could be) run as principled instruments of social justice—specifically by protecting outgroups from majoritarian self-interest based on essentialized identity politics[127]—the majority elites who control the nation's judicial machinery refuse righteously to exercise that discretion now.[128] Instead, backlash judges and

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year in the annual appropriations bill(s) signed into law. This year's version is contained in the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, Pub. L. 105-277, § 103, 112 Stat. 2681 (1999). The original version was upheld in *Harris v. McRae*, 448 U.S. 297, 326 (1980), by the majoritarian majority of the Supreme Court installed as part and parcel of cultural war. *See also* Maher v. Roe, 432 U.S. 464, 479–80 (1977) (approving legislation that provides governmental assistance for childbirth but not for nontherapeutic terminations of pregancy). Just this year, in the current version of this legislation, backlash leaders in Congress finished the task of choking off all federal funds that might facilitate women's access to reproductive rights: the media recently reported that the 1998 budget bill finally eliminated all federal funds for abortion. "Congressional anti-abortion forces, effectively, have cut off every path to abortion that involves federal money without actually criminalizing the procedure." Raja Mishra, *Package Cuts Back Federal Funds for Abortions*, MIAMI HERALD, Oct. 22, 1998, at 10A. This extinguishment is one of the social realities that cultural war produced legislatively this year, capping a multi-year campaign to implement this portion of the social agenda associated with the 1980s and 1990s triumphs of cultural majoritarianism.

127. Indeed, this insight—the distinctions and tensions between formal democracy and functional domination—was key to the landmark civil rights cases of this century. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 7–11 (1967); Brown v. Board of Education, 347 U.S. 483, 492–95 (1954). *See generally* Neal Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) (arguing that the Supreme Court's historical and continued utilization of "color-blind" constitutional analyses ignores the practical effects of racial subordination); William Wayne Justice, *The Two Faces of Judicial Activism*, 61 GEO. WASH. L. REV. 1 (1992) (elucidating the relevance of social reality to adjudication generally).

128. A recent, towering, and especially germane example is *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Supreme Court expressly opted for casual acquiesence to majoritarian preferences in the construction of sociolegal hierarchies. *See supra* note 14 (discussing the *Bowers* decision).

politicians have striven mightily during this cultural war to engineer majoritarian identity politics through judicial opinions;[129] majoritarian cultural warriors, including judges, have ensured that new judicial appointments most likely would yield new law through selectively "deferential" and "active" applications of judicial review as part and parcel of reclaiming ingroup cultural supremacy.[130]

Despite intonations of majoritarian platitudes on neutrality and democracy,[131] ingroup judges earnestly have intervened in key cases to align judicial authority and discretion with essentialized majoritarian backlash, selectively employing procedural and doctrinal devices to deny judicial relief for sexual and other minorities besieged by cultural war.[132] With the judicial process effectively closed to social justice

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129. Though judicial nominations and appointments always have been politicized, during the 1980s majoritarian backlash politicians have made them increasingly ideological. *See* Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 JUDICATURE 318, 319–20 (1989). As recent rulings indicate, the appointments of the last two decades effectively have reconstituted the federal judiciary, making it, and the law it produces, more hostile to antisubordination claims. *See, e.g.*, *infra* note 130 and sources cited therein.

130. Judicial discretion has been used by ingroup judges appointed to serve as juridical cultural warriors. These judges have tinkered with, and also revamped wholesale, doctrines and devices that tend to redress outgroup misery, reducing overall the possibility of actual or effective legal redress of outgroup social justice claims. *See, e.g.*, William B. Gould, IV, *The Supreme Court and Employment Discrimination Law in 1989: Judicial Retreat and Congressional Response*, 64 TULANE L. REV. 1485 (1990) (addressing the Court's doctrinal civil rights retrenchment in its 1989 term); Nancy Levit, *The Caseload Conundrum, Constitutional Restraints and the Manipulation of Jurisdiction*, 64 NOTRE DAME L. REV. 321 (1989) (critiquing the deployment of jurisdictional and prudential barriers to deflect civil rights claims); Cedric Merlin Powell, *Blinded by Color: The New Equal Protection, the Second Deconstruction, and Affirmative Inaction*, 55 U. MIAMI L. REV. 191 (1997) (discussing the judicial decontextualization of cases to arrive at judicially preferred results); Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381, 405–45 (1994) (reviewing judicial manipulation of equality cases in military and governmental employment cases); Valdes, *supra* note 3, at 138–98 (questioning judicial inconsistency in the application of Title VII and equal protection doctrines); Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?*, 49 MO. L. REV. 677 (1984) (analyzing the relative strictness of federal courts in analyzing the sufficiency of civil rights complaints). *See generally* DAVID G. SAVAGE, TURNING POINT: THE MAKING OF THE REHNQUIST SUPREME COURT (1992) (describing the jurisprudential politics of the present-day Court).

131. A recent, transparent example is Justice Scalia's colorful dissent in *Romer v. Evans*, in which he chides the majority for "taking sides" in a "Kulturkampf" by subjecting Colorado's Amendment 2 to alive judicial review, and holding it unconstitutional. *See* Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting); *see also supra* note 104 and sources cited therein (discussing *Romer*). *See generally* Robert P. Smith, Jr., *Explaining Judicial Lawgivers*, 11 FLA. ST. U. L. REV. 153, 157 (1983) (reciting "the temptations of dishonest rationalization, misstatement of facts, disregard of impediments to a desired result, deliberate misinterpretation of precedent, misleading emphasis, and silence when explanation is impossible" as among the "factors external" to a case that nevertheless can help decide it).

132. The series of courtroom clashes over military policy during the 1980s and 1990s is a prime example. These cases witnessed not only civil rights advocates working tenaciously to halt military persecution of sexual minority servicemembers, but also ingroup judges gyrating doctrines, analyses and procedures to justify intellectually dishonest outcomes. For a critical review of judicial politics to preserve military homophobia in those cases and rulings, see Valdes, *supra* note 130, at 400–45;

claims by the proliferation of ingroup-identified judges and clerks installed during the 1980s precisely for their majoritarian social ideology, federal courts indeed have become increasingly aligned with majoritarian self-interest in the key issues of cultural war that they have chosen to settle. In sexual orientation cases, as in race/ethnicity, sex/gender and other categories of identity, cultural war has transformed courts into custodians of backlash to facilitate the decimation of outgroup communities.[133]

The three lines of attack summarized here thereby come full circle: majoritarian prerogatives over executives, legislatures and courts are exerted to ensure that all branches and levels of government succumb to their domestication as instruments of cultural war, and that they bow in policy and practice to the imperatives of retrenchment and supremacy. When any branch or government balks, resort to the spectacle of "popular" referenda can discipline hesitant officials. And when outgroups even think of appealing the unjust results of "democratic" or juridical pronouncements to a higher or supreme tribunal, they know that a majority of today's judges and justices have been seated precisely to rebuff their claims through rulings that etch onto the public record an ostensibly authoritative ridicule of legitimate social justice aspirations.[134] Perversely, as the increasingly slim chance of judicial rulings that might alleviate outgroup oppression is precluded, trivialized or nullified by backlash

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Kurt D. Hermansen, Comment, *Analyzing the Military's Justifications for its Exclusionary Policy: Fifty Years Without a Rational Basis*, 26 LOY. L.A. L. REV. 151 (1992).

133. *See, e.g.*, Crenshaw, *supra* note 20; Freeman, *supra* note 68; *see also supra* note 130 and sources cited therein (discussing judicial retrenchment through doctrinal and procedural maneuvering). *See generally* Stephanie M. Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984) (arguing that the courts have improperly limited equal protection review in sex discrimination cases by failing to recognize participatory discrimination as a valid avenue for relief). Judicial retrenchment forced by majoritarian appointments and backlash politics was brought into jurisprudential relief by Justice Blackmun shortly before his retirement from the Supreme Court. In his separate opinion in *Planned Parenthood v. Casey*, 505 U.S. 803 (1992), Justice Blackmun begins by noting that "four Justices anxiously await the single vote necessary" to rollback reproductive rights judicially, *id.* at 922, and alludes to majoritarian backlash efforts designed to truncate reproductive rights through new judicial appointments: "I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before [the Court in *Casey*]. That, I regret, may be exactly where the choice [over the preservation of privacy rights for women] will be made." *Id.* at 943. This sentiment is made poignant by knowledge of the social climate of violence and intimidation that increasingly has surrounded women's efforts to exercise reproductive rights during the intensifcation of this cultural war. *See, e.g., supra* note 110 and sources cited therein (discussing physical attacks against reproductive health care providers).

134. This knowledge leads to the abandonment of social justice efforts and experiments, or legal claims based on them, due specifically and explicitly to this knowledge. For a very recent instance, see *Boston Drops Fight to Retain School Quotas*, MIAMI HERALD, Feb. 5, 1999, at 15A (reporting the decision of the Boston School Committee to abandon litigation and dismantle equal opportunity educational policies "because an unfavorable Supreme Court decision could have undone such programs around the country").

maneuvers, legislative and other majoritarian venues become correspondingly crucial to the vindication of outgroup social justice claims.[135]

Since 1980, the coordinated attacks pursued along these three lines of lawmaking have converged to reverse the advance of sociolegal reformation, endeavoring also to instill a general sense of permanent stratification backed both by formal law and social terror.[136] Events since the 1979 symposium thus make plain that one concrete purpose of majoritarian backlash is to secure substantial dominion over lawmaking, rendering law a compliant tool of supremacist identity politics. This purpose, as the above synopsis illustrates, has been largely met: though majoritarian retrenchment remains vigorously contested on various policy fronts, the current state of public affairs indicates that majoritarian backlash politics now permeate every lawmaking process. Because this permeation is sustained and driven by self-interested majoritarian essentialism, social justice legal scholars must help to devise an outgroup counter to that particular employment of ingroup identity in the specific context of cultural war. This scenario makes it imperative for sexual orientation legal scholars to reckon with the power of essentialized majoritarianism, and to maximize the potential of critical legal scholarship in tranquilizing its deployment to wage cultural war through backlash lawmaking.

F. *Identity Politics, Majoritarian Subordination & Strategic Quasi-Essentialism*

To counter majoritarian essentialism, outgroup scholars should proceed from a clear understanding that today's cultural war is not the first time that majoritarian identity politics have catalyzed sociolegal stratification through lawmaking prowess. On the contrary, as this symposium illustrates, this nation's social and legal history is replete with examples that confirm the power and abuse of essentialized identities to use law for the design and imposition of social hierarchy.[137] Indeed, identity politics

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135. These and similar concerns have drawn scholarly attention, but no respite. *See generally* Robin Charlow, *Judicial Power, Equal Protection and the Problem with Plebiscites*, 79 CORNELL L. REV. 527 (1994); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503 (1990).

136. For instance, in each category of sociolegal identity sketched here, cultural war combines daily microagressions with eruptions of physical violence, the hyperbolic rhetoric and aims of majoritarian referenda, the ongoing legislative attack on governmental provision of social assistance, and the selective exercise of judicial appointments and review to push retrenchment, thereby producing a cumulative effect that literally conjoins social terror and formal lawmaking in the pursuit of majoritarian backlash.

137. Susan Sterett explores the historical nature of essentialized identities and their use in defining and imposing sociolegal hierarchy through her examination of state benefits. Susan Sterett, *Husbands & Wives, Dangerousness & Dependence: Public Pensions in the 1860s–1920s*, 75 DENV. U. L. REV. 1181 (1998). Avoiding the more common approach of addressing gay and lesbian identity issues through an examination of "sexual orientation," Sterett instead analyzes historically essentialized "male" and "female" constructs within heterosexuality, as defined and strengthened by public pension law. *See id.* Similarly, Karla Robertson examines and challenges the heteronormative construction of marriage in her contribution to this symposium. Karla C. Robertson, Note, *Pene-*

among both majorities and minorities were foreseen by key founders of the nation as an inevitable source of factionalism in majoritarian law-making within the new country.[138] Since then, various majorities have employed identity essentialisms to subjugate various minorities: white supremacy, male supremacy and straight supremacy historically have relied on essentialized identities to enact legal regimes that help(ed) maintain social hierarchy, even while the targeted minorities employ(ed) a similar counter-essentialism to rally resistance against subjugation.[139]

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trating Sex and Marriage: The Progressive Potential of Addressing Bisexuality in Queer Theory, 75 DENV. U. L. REV. 1375. Viewing case law and statutes through the lens of bisexuality, Robertson uncovers the conduct-based centrality of penis-vagina penetration as the essential prerequisite for legal recognition of marriage. *See id.* 1377–96. Robertson goes on to argue, notwithstanding this conduct-based conception of marriage, that courts and Congress improperly essentialize "marriage" through the status-based construct of heterosexuality, reifying heterosexual sexual identity and its accompanying privileges. *See id.* 1400–08. The power of history and essentialism likewise is underscored in Jane Schacter's commentary in this symposium, where she argues that proposals such as Ertman's, *see supra* note 61, may have the unintended consequence of reinforcing the essentialized construction of heterosexual marriage that both Robertson and Sterett address. *See* Jane S. Schacter, *Taking the InterSEXional Imperative Seriously: Sexual Orientation and Marriage Reform*, 75 DENV. U. L. REV. 1255 (1998).

138. For instance, in the Federalist No. 10, James Madison addresses the "unequal distribution of property" as the "most common and durable source of factions" that cause the division of society among various groups. THE FEDERALIST NO. 10, at 18 (James Madison) (Roy P. Fairfield ed., 2d ed. 1966). He notes: "Those who hold and those who are without property have ever formed distinct interests in society." *Id.* When a majoritarian society uses law formally to correlate essentialized identity features such as race or sex to the ability to acquire property, as has been the case for the better part of this country's history, this sort of factionalism effectively is converted into a form of majoritarian identity politics. Functionally, this correlation still is a fact of life in this society. *See, e.g.*, Roy L. Brooks, *The Ecology of Inequality: The Rise of the African-American Underclass*, 8 HARV. BLACKLETTER J. 1, 3–4 (1991). Madison also recognized more directly how identity politics figure into factionalism; focusing on a particularly problematic identity feature of his era, religion, Madison similarly notes in the Federalist No. 10 that "different opinions concerning religion," like unequal distributions of property, disposed humans to "vex and oppress each other." THE FEDERALIST NO. 10, at 18 (James Madison). Similarly, but more nakedly, Benjamin Franklin practiced identity politics based on nationality, ethnicity and language when he sought to subordinate German identity to English identity in the new nation. *See* Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269 (1992). Clearly, this nation was founded on a recognition, acceptance and practice of essentialist identity politics by those in control of the founding.

139. Perhaps the most egregious example is race-based slavery and the Jim Crow regime that followed racial slavery's formal abolition after the Civil War. In those essentialist schemes, all persons of one "white" "race" were deemed innately and uniformly superior to all persons of other "races." Pithily encapsulating racial essentialism from a white supremacist perspective, Chief Justice Taney pronounced in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), that Africans and blacks "had for more than a century before been regarded as beings . . . so far inferior, that they had no rights which the white man was bound to respect." *Dred Scott*, 60 U.S. (19 How.) at 407. Both before and after slavery's formal end, essentialist concerns about racial purity and hierarchy governed majoritarian identity politics. *See generally* Barbara K. Kopytoff & A. Leon Higginbotham, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 GEO. L.J. 1967, 1968 (1989) (discussing the approach to racial purity and interracial marriage before and after the Civil War); Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161, 1163 (1997) (discussing racialized anxieties defined by ancestry and blood line). However, the activation of essentialism in majoritarian

Majoritarian essentialism that deployed law formally and with virtual impunity through the first half of this century to subordinate vulnerable minority groups easily ranks among the most abusive examples of identity politics yet recorded in this nation's history.

But history, like discourse, is not a static phenomenon. Though still stratified, society is no longer frozen formally along strictly essentialist lines that spotlight relatively simplistic identifications attributed to race, sex/gender, sexual orientation or other identity features. The erosion of formalized majoritarian essentialist regimes, and the intricacy of social forces associated with that erosion, have opened fissures that further complicate identity politics among outgroups—complications that multiplicity and intersectionality effectively seek to highlight.[140] Sociolegal stratification based on identity, though still anchored to essentialist structures and their vestiges, thereby has become a more complicated phenomenon; even while essentialism continues to drive majoritarian privilege and prejudice, the years since the 1979 symposium have seen a gradual decline of identity essentialism as a reliable basis *specifically for social justice solidarity among outgroups*. In a postmodern and heterogeneous society such as this one, sharing one or a few identity features cannot provide a sturdy basis for antisubordination solidarity, much less for social justice coalitions that span intra- as well as inter-group diversities.

More to the point, the activities and pronouncements of Clarence Thomas blacks, Linda Chavez Latinas/os and Log Cabin Republicans—who advocate analyses of law and society that belittle the present importance of majoritarian power relationships based on essentialized identities—have demonstrated beyond any significant doubt how mere "identity" is unreliable as a basis of outgroup antisubordination

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identity politics to subordinate minorities extends to sex/gender and sexual orientation categories as well. Thus, in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872), Chief Justice Reynolds essentialized sex (and gender) in concurring that the state could prohibit all married persons of one sex from receiving a license to practice law because "divine ordinance" dictated that the "paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Bradwell*, 83 U.S. (16 Wall.) at 141. To this day, the United States Armed Services, with the full complicity of the nation's courts, continue to essentialize minority sexual orientation by effectively ordaining all lesbian and gay persons as innately unfit for military service. *See* Valdes, *supra* note 130, at 465–74.

140. *See supra* Part C. In this symposium, Nan Boyd's article on the commodification of gay and lesbian identity illustrates how multiplicity and intersexionality may illuminate intragroup issues of difference and diversity, thereby complexifying "sexual orientation" communities, issues, and agendas. Nan Alamilla Boyd, *Shopping for Rights: Gays, Lesbians, and Visibility Politics*, 75 DENV. U. L. REV. 1361 (1998). Boyd critiques the notion held by many within the gay rights movement (including to some extent, myself, *see* Valdes, *supra* note 81) that increased visibility (through means such as mainstream advertising) promises increased acceptability and, hence, increases in civil rights. *Id.* at 1363–65. Without accepting or conceding that increased visibility must result in Queer homogenization and hierarchy, Boyd effectively argues that mainstream advertising oblivious to multiplicity and intersectionality may cause shortcomings tending to alienate members of the movement based upon gender, race and class, thereby "deepening the gulf between privileged and non-privileged queers." *Id.* at 1371.

affinity.[141] By telling black people and other minorities, including sexual minorities, that identity no longer matters much, either legally or socially, Clarence Thomas and his ilk disable minority identities specifically as a means of forging antisubordination consciousness. Yet they rarely pause to interrogate how entrenched majorities, including the (hetero)sexual majority, continue to play on majority identities and privileges as a means of majoritarian bonding and essentialized domination. In this way, identity has become a basis for enjoying the privileges of domination and a taboo for rallying resistance to domination.

The point of this critique is not to argue that all or most outgroup social justice analyses should agree with each other. The point is not the promotion or acceptance of *any* essentialized analysis. The point is that essentialized identifications inform *all* outgroup re/actions in the context of today's cultural war precisely because essentialized identity drives majoritarian backlash and cultural warfare; neither outsider legal scholars—nor Clarence Thomas blacks, Linda Chavez Latinas/os and Log Cabin Republicans—can extricate ourselves unilaterally from the cultural conflicts that pervade our social and legal environments; we cannot exercise social or legal agency without becoming implicated in the essentialized and politicized conflicts of majoritarian cultural war. To act as if we could is to be reckless with the sociolegal wellbeing of the outgroup communities from which we hale, and for whom we professedly seek to make the world a better place.

On the contrary, Queer and allied scholars must recognize the resonance of identity, and the reasons behind essentialist identity politics, among outgroups: resilient presumptions of quasi-essentialist affinity among outsider communities are reinforced precisely by the fact that disfavored identity features still serve as a primary basis for the structural and social mistreatment of humans by other humans.[142] Outgroups exhibit

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141. I employ these figures as tropes for a particular type of mentality about identity and position in today's cultural war, which is described in the text above. *See supra* notes 67–100 and accompanying text. In each of these three instances, the essentialized figure is outgroup-identified but, in each instance, the same figure aligns with majoritarian-identified positions on issues of cultural war. In each instance, this mentality and its public expression have helped drive career advancement and generate celebrity status. The identity and power dynamics suggested by this trio of figures suggest that outgroup essentialism is a thin reed for expectations of social justice affinity during a cultural war. *See generally* Ellis Cose, *The Obligations of Race*, TIME, Aug. 10, 1998, at 53. For a sampling of identity/power tidbits about these figures, see *Marching to a Different Drummer*, TIME, July 15, 1991, at 18 (discussing Clarence Thomas's ascension to the Supreme Court and providing excerpts of Thomas's remarks regarding issues such as racism and affirmative action); *Clarence Thomas Says: "I'm No Uncle Tom,"* JET, Nov. 14, 1994, at 4; Stephen Goode, *Civil-Rights Conservative Chavez Stirs Up the Melting-Pot Issue*, INSIGHT MAG., July 21, 1997, at 18; Jack E. White, *Says He's Nobody's "Slave," But Clarence Thomas Has a Master: The Right Wing*, TIME, Aug. 10. 1998, at 64.

142. Of course, outgroup essentialism also can be fostered by a sense of shared culture or similar points of connection that in some ways can be related to identity. This point is one area of exploration within LatCrit theory. *See generally infra* note 161 and sources cited therein. Without

essentialist susceptibilities in part because ingroup exploitation of essentialized identities invites and requires it. This reactive affinity among outgroup individuals and communities is, at least in part, a product of majoritarian essentialism in today's cultural war.

For instance, majority-identified humans, such as those who allegedly murdered Matt Shepard, mistreat and sometimes murder minority-identified humans precisely because they are identified as "different" in a way that still is imbued with social, legal and political essentialism.[143] This continued abuse of majoritarian identity in turn causes the mistreated humans to identify with each other on the basis not merely of the targeted trait but, more importantly, on the basis of the social significance given to it and the experience with mistreatment that it incites: this experience can lead to struggle against continued mistreatment, and in this struggle persons and groups who may have been similarly mistreated due to a similarity of identity may tend to gravitate toward each other for solace and alliance.[144] Historically and presently, majoritarian essentialism directly fuels outgroup essentialism in the politics of identity and equality. Thus, despite the rise of multiculturalism and postmodernism, essentialist identities and outgroup experiences with majoritarian power continue to be correlated in social life, thereby prolonging outgroup disposition to essentialism.

Of course, humans who share the sexual orientation of Matt's alleged murderers do not automatically share a murderously homophobic antipathy for those who share Matt's sexual orientation. And similarly, not all of those who share Matt's sexual orientation share his experience, or fatal fate. Due both to the multiplicity of human identities and other vagaries of life, the basic equation of identity, experience, consciousness and reaction is much more volatile: identity, experience and politics, though still substantially correlated in a multicultural and postmodern society, are neither neatly nor necessarily one and the same. This disjunction helps to explain the existence of Thomas Clarence blacks, Linda Chavez Latinas/os and Log Cabin Republicans, whose reactions to identity and experience in the specific context of cultural war illustrate and magnify the uncertainty of simplistic correlations.[145]

But this complex interplay of identity, experience and consciousness also helps to explain the present power of outgroup essentialism: *A*

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slighting this observation, the point of this analysis is that supremacist majoritarian essentialism, and mistreatment of outgroups based on that essentialism, specifically reinforce essentialist tendencies within the similarly mistreated members of outgroups.

143. *See supra* notes 62–69 and accompanying text.

144. *See generally* Regina Austin, *"The Black Community," Its Lawbreakers, and a Politics of Identification*, 65 S. CAL. L. REV. 1769 (1992) (arguing for the revitalization of the "black community" through a "politics of identification"); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994) (describing shared victimhood and struggle as a basis for solidarity).

145. *See supra* note 141 and accompanying text.

shared feature of identity continues to suggest, even if it does not make certain, a shared experience with (or reaction to) the abuse of privilege and infliction of injustice. The coexistence of Clarence Thomas blacks and white privilege, as well as analogous phenomena, thus depict the complexity of social experience and conscience in this society at this time. In this postmodern era, a shared sexual orientation—or race and gender—therefore can at best suggest only a strategically quasi-essentialist presumption of collaborative inclination toward antisubordination goals.

By strategic quasi-essentialism[146] I mean a careful re/calibration, in part through multidimensional critical legal scholarship, of group power relations that recognizes the power of "identity" to ensure that "identity politics" develop, rather than displace, antisubordination purpose. Strategic quasi-essentialism is a method of legal scholarship and praxis that recognizes the coexistence of essentialism and postmodernism in public affairs, and which seeks to manage on behalf of social justice the complexities of diversity and solidarity in a majoritarian order.[147] Strategic quasi-essentialism is valuable both to intra- and inter-group antisubordination efforts that encompass varied *and* overlapping identity categories.

This form of outgroup quasi-essentialism is strategic precisely because it uses identity only as a point of departure for antisubordination commitment and as the basis of outgroup collaboration. And antisubordination purpose is elemental to multidimensional discourse because it provides an organizing principle for social justice scholarship and praxis—a principle with heightened importance in the midst of cultural war. Multidimensional analyses that incorporate both antisubordination purpose and strategic quasi-essentialism are crucial because, in time, they also may come to elaborate a capacious vision of a postsubordination order that is not only a politically viable alternative to the majoritarian status quo but, more importantly, a regime of egalitarian justice facilitated by law.[148]

G. *Multidimensional Scholarship's Relevance to Social Transformation*

To be sure, this Afterword is not the first time that attention to majoritarian lawmaking has been urged in sexual orientation legal scholarship.[149] But the key linkage stressed here is the relationship between es-

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146. *See* Stephanie M. Wildman, *Reflections on Whiteness and Latina/o Critical Theory*, 2 HARV. LATINO L. REV. 307, 311 (1997) (suggesting "strategic" essentialism as outgroup antisubordination method).

147. *See* Harris, *supra* note 144, at 759–63.

148. For elaboration of postsubordination vision as jurisprudential method, see Valdes, *supra* note 51.

149. *See, e.g.*, William B. Rubenstein, *Since When Is the Fourteenth Amendment Our Route to Equality?: Some Reflections on the Construction of the Hate Speech Debate from a Lesbian/Gay Perspective*, 2 LAW & SEXUALITY 19, 19 (1992).

sentialist majoritarian lawmaking and multidimensional legal scholarship in the specific context of today's cultural war: under prevailing sociolegal circumstances, multidimensional analysis is more likely than unidimensional analysis to produce effective interventions in contemporary lawmaking based on majoritarianism and essentialism because multidimensionality can help to connect various "minority" aspirations that, on their own, stand relatively little chance of success in majoritarian contests dominated by essentialized backlash and elitist self-interest. Multidimensionality is one means toward the social relevance of antisubordination legal scholarship, especially when operating under the political onslaught of self-interested majoritarianism filtered through essentialized appeals to the relevant majority.

Multidimensional analyses are better suited to the antisubordination needs of diverse minorities seeking justice from a majoritarian "democratic" system because they can help to illuminate the bases for interconnection and collaboration among minority outgroups to help all minorities withstand the pressures of majoritarian cultural aggression. And by "minorities" I mean both minorities within sexual minority communities as well as beyond them; I mean, for instance, members of sexual minorities who do not share Matt's race/ethnicity and sex/gender privileges as well as women, racial/ethnic minorities, and other subordinated outgroups who identify as members of the sexual majority. Multidimensional frameworks are important in a society still gripped by majoritarian essentialism as the dominant form of identity politics because they help not only to map, but to explain, the ethics of a functional, as opposed to merely formalist, social consensus on the principle that identity should never be used to subordinate, whether identity is based on race/ethnicity, sex/gender, sexual orientation or some other essentialized feature of personhood and regardless of whether it is secured by "democracy."[150]

By mapping and explaining the interconnected structuring of subordination, multidimensional analyses can help to frame and justify a cor-

150. A similar consensus was previously organized around the antidiscrimination principle and the notion of equal citizenship. Indeed, this nation regards itself proudly bound to, and the prime champion of, principles of equality and nondiscrimination. *See generally* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976) (examining the history of the "antidiscrimination principle" by which classifications and decisions based upon race are disfavored); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977) (examining the constitutional origins and development of equality principles). These principles, even as aspirations, certainly are incompatible with the brute exercise of majoritarian power through backlash lawmaking and cultural warfare that includes social terror. *See supra* Part E. The tension between democracy and equality therefore generally has been palpable in the controversies that surround sexual minority social justice claims. *See, e.g.*, Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, U. CHI. L. REV. 1161, 1170–78 (1988); *see also supra* note 14 and sources cited therein (discussing equality law and sexual orientation).

responding structuring of antisubordination resistance.[151] By showing how different forms of bias travel together and combine in social operation,[152] multidimensional analysis may begin to unite multiply diverse outgroups and persuade skeptics that all forms of discrimination based on essentialized identification are wrong for the same reason: they subvert the national commitment to equality, liberty and justice, spreading instead human suffering, as well as social dysfunction and disharmony.[153] Progress no doubt will be fitful and incremental, and sometimes perhaps even mostly symbolic, but insisting on multidimensionality in sexual orientation scholarship will better position Queer and allied scholars to help ensure that majoritarian lawmaking on the whole will be more receptive to legal reform toward social justice for multiply diverse outgroups. Without being sanguine about capacity, we can persist through multidimensional scholarship and praxis in the accumulation of momentary, but perhaps enduring, social justice gains. But the efficacy of the prospective evolution toward multidimensionality in sexual orientation discourse that is suggested by this symposium and its counterpart depends ultimately on a recognition of both the need for solidarity and the fact of diversity within and beyond sexual minority communities.

H. *Diversity, Solidarity & Critical Coalitions in Multidimensional Analysis*

Despite their insight and promise, these symposia represent but a first step toward a focused yet multidimensional legal discourse on sexual orientation. The balanced evolution that these symposia indicate, and hopefully initiate, bring to the fore serious and complicated issues: not

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151. Karen Engle takes a step in this direction with her article in this symposium. *See* Engle, *supra* note 20. Using gay rights issues as a case in point, Engle argues that backlashers' conflation of "equal" and "special" rights affects not only the gay rights debate, but implicates all civil rights struggles. *Id.* at 1270–81. Rejecting the implied premise of backlashers that "special" rights are necessarily destructive, Engle's analysis shows why multidimensional antisubordination scholarship must transcend the inherited boundaries of essentialist identity formations. *See id.* at 1291–1301.

152. The interconnected nature of social prejudice based on "different" identity features, such as race/ethnicity and sexual orientation, is captured vividly in the multidimensionality of the bigotry embodied by Matt Shepard's alleged murderers. *See supra* note 62–69, 143 and accompanying text. For a sample of studies that document the interconnection of biases based on sexual orientation, sex/gender and race/ethnicity, see Valdes, *supra* note 3, at 55 n.148; *see also* Thomas J. Ficarrotto, *Racism, Sexism, and Erotophobia: Attitudes of Heterosexuals Toward Homosexuals*, 19 J. HOMOSEXUALITY 111, 115 (1990) (finding that racism, sexism and erotophobia are "independent and equal predictors of antihomosexual sentiment"). For a critical review of the same interconnection, see Clark Freshman, Whatever Happened to "Anti-Semitism?": Generalized Discrimination, Proof of Discrimination, and Social Science (unpublished manuscript on file with author); *see also* Clark Freshman, Note, *Beyond Atomized Discrimination: Use of Acts of Discrimination Against "Other" Minorities to Prove Discriminatory Motivation Under Federal Employment Law*, 43 STAN. L. REV. 241, 269 (1990).

153. *See generally* Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 UCLA ASIAN-PAC. AM. L.J. 33, 35 (1995) (urging that a "multidimensional concept of interracial justice is, in many instances, an integral, although often overlooked component of peaceable relations and coalition-building among racial minorities").

only must we balance a focus on "sexual orientation" with an intersectional and multidimensional expansion of sexual orientation discourse, we also must do so in a way that balances diversity with solidarity to produce social change in a majoritarian and "democratic" system. We must, in other words, pursue a successful engagement with a threshold postmodern issue that to date has eluded outsider legal scholars generally: balancing human complexity and social heterogeneity in a scholarship of antisubordination solidarity.

The move to multidimensionality thus conjures the lingering "sameness/difference" dilemma that has preoccupied outsider scholars in recent years—a dilemma that has spurred attempts to accommodate diversity and cultivate solidarity to advance social justice through increasingly multidimensional analysis.[154] Solidarity in diversity has been elusive specifically within social justice discourse and projects because this balance requires both the recognition and accommodation of relevant commonalties and diversities to advance antisubordination discourses, projects or agendas. To transcend this sense of dilemma, antisubordination scholarship on sexual orientation must dedicate itself to the development of means that will enable multiply diverse sexual minorities (and other multiply diverse outgroups) to evaluate critically how claims of solidarity and diversity may tend to advance social justice goals and/or replicate existing patterns of privilege.[155] A panacea for this need to discern has yet to be found but—again—the work of critical race and other outsider theorists provides some promising, if imperfect, apertures.

Scholars identified with outsider jurisprudence have urged in recent years that antisubordination projects must be "grounded" in social context to ensure the practical relevance and transformative potency of critical legal scholarship. In addition to engaging multiplicity and intersectionality, Queer multidimensional scholarship persistently and progressively must "look to the bottom"[156] and "ask the other question(s)"[157] to

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154. *See generally* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 15 (1990) (exploring conceptions of "difference" within the American legal system and advocating "a shift from a focus on the distinctions between people to a focus on the relationships within which we notice and draw distinctions"); Regina Austin, *Black Women, Sisterhood, and the Difference/Deviance Divide*, 26 NEW ENG. L. REV. 877, 878 (1992) (noting that "sameness," "difference," and "deviance" are mechanisms or tools that women use to define the black community); Martha Albertson Fineman, *Feminist Theory in Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1 (1992) (noting the implications of legally relevant differences between men and women); Joan Chalmers Williams, *Dissolving the Sameness/Difference Debate: A Post-Modern Path Beyond Essentialism in Feminist and Critical Race Theory*, 1991 DUKE L.J. 296, 299 (advocating a post-modern approach to sameness and difference as a stable set of "essential" differences will disappear in that analysis).

155. *See generally* Jerome McCristal Culp, Jr., *Latinos, Blacks, Others, and the New Legal Narrative*, 2 HARV. LATINO L. REV. 479 (1997) (arguing that outsider scholarship must not accept the racial or identity status quo as a starting point for discussion).

156. *See* Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987) ("[A]dopting the perspective of those who have seen and felt the falsity of the liberal promise can assist critical scholars in the task of fathoming the phe-

help contextualize social justice issues in intra- and inter-group frameworks. Queer and allied scholars consciously must choose, and then continue, to engage sameness/difference issues with interconnective,[158] cosynthetic,[159] wholistic[160] methods and mindsets. By practicing and disseminating these and other postmodern techniques of critical analysis, we can bring into existence a multidimensional sexual orientation legal discourse to help empower multiply diverse sexual minorities; through sexual orientation multidimensionality, we can help to foster intra- and inter-group appreciation of both outgroup similarities and differences in a way that enables successful interventions in majoritarian and "democratic" lawmaking.[161] Despite our human faults and frailties, Queer and allied scholars jointly can help to create a progressive balancing of diversity with solidarity to promote and expand antisubordination transformation.

The methods of outsider jurisprudence thus should be applied not only to ground critical theory generally, but also with the specific aim of establishing viable frameworks of intra-and inter-group collaboration in majoritarian and "democratic" processes or venues through the design of

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nomenology of law and defining the elements of justice."). In this InterSEXionality Symposium, Patricia Cain exemplifies both the application and the effectiveness of "looking to the bottom" in "sexual orientation" context through her examination of the lives of individual transsexuals. *See* Cain, *supra* note 66.

157. *See* Mari J. Matsuda, *Beside My Sister, Facing the Enemy: Legal Theory Out of Coalition*, 43 STAN. L. REV. 1183, 1189 (1991) ("asking the other question" as a method of understanding all forms of subordination).

158. *See* Francisco Valdes, *Sex and Race in Queer Legal Culture: Ruminations on Identities and Interconnectivities*, 5 S. CAL. REV. L. & WOMEN'S STUD. 25, 26 (1995) (defining interconnectivity as "a call for a new found appreciation of the situational commonalties that frame the histories" of sexual minorities).

159. *See* Peter Kwan, *Jeffrey Dahmer and the Cosynthesis of Categories*, 48 HASTINGS L.J. 1257, 1280 (1997) (defining cosysthesis as "a dynamic model whose ultimate message is that the multiple categories through which we understand ourselves are sometimes implicated in complex ways with the formation of categories through which others are constituted").

160. *See, e.g.*, e. christi cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 500 (1998) (defining wholism as a "theory of radical individualism" without intersections).

161. This description is apt for the ambitions that LatCrit theorists have undertaken in recent years. *See* Francisco Valdes, *Foreword: Under Construction: LatCrit Consciousness, Community, and Theory*, 85 CAL. L. REV. 1087, 1111 (1997); *see also* Symposium, *Comparative Latinas/os: Identity, Law and Policy in LatCrit Theory*, 53 U. MIAMI L. REV. (forthcoming 1999); Symposium, *Difference, Solidarity and Law: Building Latina/o Communities Through LatCrit Theory*, 19 UCLA CHICANO-LATINO L. REV. 1 (1998); Colloquium, *International Law, Human Rights, and LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 1 (1997); Symposium, *LatCrit: Latinas/os and the Law*, 85 CAL. L. REV. 1087 (1997); Symposium, *LatCrit Theory: Naming and Launching a New Discourse of Critical Legal Scholarship*, 2 HARV. LATINO L. REV. 1 (1997); Colloquium, *Representing Latina/o Communities: Critical Race Theory and Practice*, 9 LA RAZA L.J. 1 (1996). For a comparison of critical race theory, gay and lesbian scholarship, and LatCrit theory, see Valdes, *supra* note 51.

critical coalitions.[162] By "critical" coalitions I mean "alliances based on a thoughtful and reciprocal interest in the goal or purposes of a coalition," as opposed to partnerships skewed in favor of one partner over others in ways that are structural or persistent rather than strategic or momentary.[163] Critical coalitions therefore require a commitment to a "rotation of centers" that ensures thoughtful distribution of attention and energy to pursue efficiently the social justice interests of all coalition partners as coalition partners. This rotation correspondingly requires all partners to accept a partial and periodic de-centering of immediate or unidimensional self interest: in this scheme, coalitional resources and priorities rotate along with the center, and as part of a vision geared to balancing and harmonizing the goal of social justice for all. Of course, critical coalitions, like all human endeavors, depend on their execution for their success. But the bedrock of a critical coalition is that no single identity or interest ever will rise to the level of domination, much less hegemony. This concept applies always and simultaneously both to the intra-[164] and inter-[165] group aspects of these coalitions.[166]

To articulate intra-sexual minority diversity and solidarity, Queer and allied scholars must engage the process of discovering how race/ethnicity, class, dis/ability, geography and religion, as well as sex/gender, intersect and interact with sexual orientation to produce varied layers and experiences of social life and legal opportunity for lesbians, gays and other sexual minorities. To mobilize intra-sexual minority coalitions we must craft a scholarship that both maps points of connection and tempers axes of contention. We must emphasize how sexual orientation discrimination affects us all while we recognize and interrogate how that discrimination is made variable for "different" members of sexual minorities by the other identity factors that make us richly diverse. Though delicate and daunting, our task is to register the ways and means through which interlocking structures of subordination deprive multiply diverse sexual minorities of social justice and legal rights both differently and commonly. Only in this way can sexual minorities exert our full power and potential to promote just laws and lawmaking.

To delineate inter-group coalitions, Queer and allied scholars similarly must dedicate ourselves and our scholarly labors to understanding and charting how straight supremacy, white supremacy, male supremacy

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162. *See* Elizabeth M. Iglesias & Francisco Valdes, *Afterword—Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis*, 19 UCLA CHICANO-LATINO L. REV. 503 (1998).

163. Valdes, *supra* note 51; *see also infra* note 179 and accompanying text.

164. By intra-group aspects of critical coalitions I mean collaborative efforts that cross lines of class, gender, color, geography and region within the internally diverse communities that make up the sexual minority population of this country.

165. By inter-group aspects of critical coalitions I similarly mean collaborative efforts that cross sexual orientation lines—those that help to coalesce sexual minorities and the sexual majority around the project of social justice, equality and harmony for and among *all* sexual orientations.

166. Valdes, *supra* note 51.

and other hierarchies supported by law directly and indirectly interlock to produce the manifold injustices perpetrated by the continued domination of Euro-heteropatriarchy within our communities, throughout the United States and, ultimately, the world. The same substantive and strategic considerations should help to inform and guide social justice scholarship on intra- as well as inter-group issues.[167] To develop critical coalitions that remain true to social justice transformation both within and among traditionally subordinated groups, our scholarship must be informed by knowledge of, and fidelity to, the lived conditions that materially represent the range of social injustices that we purport to combat and seek to reform. Only in this way can overlapping outgroups combine strengths and resources to make a difference on majoritarian and "democratic" terms.

Thus, even while recognizing our limits, our responsibility as antisubordination scholars remains constant: to devise conceptual frameworks that may help foster a culture of understanding and coalition among multiply diverse and overlapping outgroups as one means toward effective and efficient outgroup reform agendas. This responsibility is recognized throughout this symposium. Indeed, much of the power and promise projected by the works presented in this symposium come from the fact that they respond to this responsibility—the responsibility to activate the power of identity for social justice on behalf of multiply diverse sexual minorities.[168] As in this symposium, Queer legal theory must be animated and measured by its responsiveness to our collective responsibility for advancing antisubordination collaboration among groups that otherwise might not appreciate how critical outgroup coalitions are a predicate for materializing social justice through legal reform. This responsibility can be met, as well as measured, on at least four levels of discourse.

I. *Levels of Multidimensionality to Ground Queer Legal Theory*

The efforts of various outgroup legal scholars to construct an antisubordination discourse has produced insights, such as multiplicity and intersectionality, that point the way toward multidimensionality.[169] These efforts, coupled with related insights produced since 1979 through outsider jurisprudence,[170] in turn suggest four levels of multidimensionality that should be palpable in a Queer legal theory as a form of social justice legal scholarship that incorporates both intra- and inter-group issues of sameness and difference, and that engages these issues with antisubordination purpose. These are:

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167. *See* Valdes, *supra* note 26, at 1321–25.

168. *See* Symposium, *InterSEXionality*, *supra* note 4; *see also supra* notes 20, 29, 53, 61, 66, 137, 140, 151, 156 (addressing ideas presented in this symposium).

169. *See supra* notes 21 and 39–40 and accompanying text.

170. *See supra* notes 158–60 and sources cited therein.

1. The first is a focus on "sexual minorities"[171] as a distinct but multiply diverse and transnational social group, and, more specifically, on this diverse group's relationship to law or current legal regimes/practices. This first level of multidimensionality flows directly from well-established insights, like multiplicity and intersectionality.[172] The idea, therefore, is to "center" sexual minorities qua sexual minorities in legal discourse, but to do so in a way that recognizes and accounts for the many axes of diversity that help to define sexual minority commonality and heterogeneity, both domestically and internationally. In this way, this first level helps both to focus the discourse as well as to texture it. Through this effort, the social and legal significance of intra-sexual minority "sameness" and "difference" might come to be better understood to aid antisubordination purpose.[173]

2. The second level is geographic specificity, delineated by political or sociolegal units such as a neighborhood, city, state, or nation, that provide material frames for analyses of law and life.[174] This second level, like all other schemes of analytical classification, is adjustable to varying degrees of generality. The idea, however, is to use geographic or regional specificity to promote critical awareness and comparative analyses of different social in/justice histories, dynamics and conditions at different sites or locales.[175] Focusing on sexual orientation, this second level of multidimensionality is counseled by the transparent disparities between Matt's Wyoming and the sociolegal conditions prevailing in, say, San Francisco's Castro District—or, for that matter, in other parts of the globe.[176] This effort, like the first level of multidimensionality, produc-

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171. For a brief explication of this category and its utility as a unit of analysis, see *supra* note 5.

172. *See supra* Part E.

173. *See supra* note 154 and accompanying text.

174. *See, e.g.*, Darren Rosenblum, *Geographically Sexual? Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119 (1996) (focusing on New York City Council redistricting to argue for the viability of proportional representation to support sexual minority interests). *See generally* Keith Aoki, *Race, Space and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L.J. 699 (1993) (critiquing the gentrification of United States housing markets); John O. Calmore, *Racialized Space and the Culture of Segregation: "Hewing a Stone of Hope From a Mountain of Despair,"* 143 U. PA. L. REV. 1233 (1995) (advocating the building of a "culture of resistance" through grass roots movements grounded in lived experience and concrete social conditions); Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, *in* CRITICAL RACE THEORY: HISTORIES, CROSSROADS, DIRECTIONS, *supra* note 36 (analyzing the role of law in creating racialized social places and the role of critical theory in redressing the injustices thereby perpetrated); Martha Mahoney, Note, *Law and Racial Geography: Public Housing and the Economy in New Orleans*, 42 STAN. L. REV. 1251 (1990) (examining racisim through the location and construction of public housing in New Orleans).

175. This idea is a key feature of the LatCrit conferences and symposia that were initiated in the mid-1990s. *See generally supra* note 161 and sources cited therein.

176. News reports of Matt's murder generally described Wyoming as markedly inhospitable to sexual minority life; it is, the media reports, "tough business . . . to be gay in cowboy country." Lopez, *supra* note 62, at 38. San Francisco's Castro District, on the other hand, is widely regarded as one of the most developed sexual minority neighborhoods in the world. *See generally* RANDY

tively can inform scholarly and activist understanding of sexual minority sameness/difference issues, highlighting those that are caused or complicated by geographic or regional dis/continuities in law and society.

3. The third level is a persistent exploration or elucidation of cross-group histories or experiences with law and power, such as those based on race/ethnicity, socioeconomic class, sex/gender, sexuality and religion. The idea of this inter-group focus is to ensure that Queer legal theory, in addition to incorporating intra-sexual minority diversities, also contextualizes sexual orientation issues in inter-group frameworks.[177] This effort thus is related to the first, and similarly flows from well-established outsider insights. However, this third level of multidimensionality carries into cross-group terrain the effort to understand, and then harness for antisubordination effect, sameness/difference issues with contemporary sociolegal significance.

4. The fourth level of multidimensionality, like the third, attends to inter-group issues. This level is a focus on connecting and/or contrasting Queer legal theory to other genres of scholarship, and, in particular, the various strands of outsider jurisprudence (critical race theory, feminist legal theory, LatCrit theory) that critique race/ethnicity, class, sex/gender and other categories of social-legal identities and relations. This effort progressively can lead to expanding engagements with other jurisprudential developments and communities that similarly are congruent with social justice transformation.[178] This effort, in time, can help to reveal the characteristics not only of outgroup histories and positions, it also can help to reveal the strengths and shortcomings of pre/existing discourses that help to construct those groups in contemporary law and

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SHILTS, THE MAYOR OF CASTRO STREET: THE LIFE & TIMES OF HARVEY MILK (1982) (exploring the development of the Castro District through an examination of the life and death of its unofficial mayor, Harvey Milk). In the wake of Matt's murder, and in contrast to it, media reports also suggest how regional and geographic considerations may affect antisubordination analyses of sociolegal issues. For instance, within weeks of Matt's murder the media was reporting that "changing European attitudes toward homosexuality" in recent years had produced the enactment of "laws prohibiting discrimination against gays and lesbians" as well as laws recognizing the legitimacy of same-sex unions. *See* Carla Power, *Now It's the Gay Nineties?*, NEWSWEEK, Nov. 23, 1998, at 35, 35. These kinds of laws do not yet exist in this country because they are still viciously, and successfully, opposed by majoritarian cultural warriors. *See supra* Parts D, E. Of course, geography, like all else can provide only a partial and shifting lens into sociolegal issues. For instance, only a few years ago the media also was reporting that small-town America slowly but surely was enlightening itself on sexual orientation issues. *See, e.g.*, Debra Rosenberg, *Homophobia*, NEWSWEEK, Feb. 14, 1994, at 42. The point, therefore, is that geography, as *one* level of multidimensionality can help critical scholars to excavate structures of subordination for more comprehensive, and comparative, analyses.

177. *See supra* notes 53–66 and accompanying text.

178. For instance, discourses on dis/ability and law, and on therapeutic jurisprudence, are likely candidates for engagement. *See generally* THE DISABILITY STUDIES READER (Lennard J. Davis ed., 1997) (discussing disability theory in a manner similar to the way race, gender and class have been theorized); DAVID B. WEXLER & BRUCE J. WINICK, LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (1996) (suggesting that law can be seen to function as a kind of therapeutic agent).

society. This level of multidimensionality thus turns the focus inward, urging all scholars to consider not only inter-group issues, but to articulate each project consciously in the context of varied, and perhaps paralleling, multilateral discourses.

In tandem, these four levels of multidimensional analysis represent a scholarly commitment to a continual and balanced "rotation of centers" that permits a social justice discourse both to focus on particularity as well as to induce knowledge that is part of a larger mosaic.[179] This rotation, as noted above, values both specificity and generality, and values most their synthesis and balance as antisubordination method. This multidimensionalized rotation of centers is designed to balance over time the need for both micro- and macro- analyses of subordination in order to allow critical understanding both of particularity in specific contexts as well as of the patterns created through the accumulation of particularities across specific, but perhaps recurrent, sociolegal arrangements. This rotation thus represents a commitment to mapping both the continuities and discontinuities of intra- and inter-group positions across various social and doctrinal domains, but always vis-à-vis egalitarian social justice goals that can be advanced through law and legal reform.

Of course, not every project need operate on all four levels of multidimensionality at once. Given the need for focus and the limitations of time and space, it is unclear whether doing so is warranted, much less feasible. However, every social justice scholar consciously should consider the propriety of doing so in light of the circumstances and conditions that define these times. To do so, scholars will need to weigh factors like the context and mission of each project, as well as the relationship of different identity constructs to a particular project's focus, context and mission. The conscious decisions about multidimensional scope and reach that each scholar then makes for every project should help both to inform carefully, and to qualify explicitly, the parameters of each project as a form of social justice intervention.[180]

Over time, the net result of the scholarly practices suggested by these four levels should be a jurisprudential culture of enhanced awareness of the multidimensional issues implicated by every project and every discourse, even if not all such implications actually are engaged in a particular project. This net result is possible because these four levels of multidimensional analysis are transportable across fields of law and life, and thereby can serve as a basic framework for the construction of Queer and allied discourses organized around egalitarian fidelity to antisubordination purpose, both internally and externally. These four levels can be applied to social or doctrinal issues that, like sexual orientation

179. *See* Valdes, *supra* note 51; *see also supra* notes 162–66.

180. *See generally* Valdes, *supra* note 26, at 1326–28 (noting that minority theorists must articulate the position from which they "conceive and articulate" their analysis).

scholarship, range from constitutional to family law.[181] As a set, these four levels of multidimensionality, and perhaps others, can serve as a template for critical antisubordination analysis that is adjustable and applicable to variegated social or doctrinal contexts and that can advance outgroup interests in law and lawmaking contexts.

Fortunately, the twin symposia of 1997 jointly place us at the cusp of realizing this linkage specifically in the context of sexual orientation legal scholarship. These symposia project an unrelaxed concern for sexual orientation and homophobia.[182] Yet, they also signal a newfound concern for the interaction—or intersexion—of sexual orientation and other aspects of gay and lesbian interests,[183] which may help multiply diverse sexual minorities to begin coalescing more effectively with racial/ethnic, sex/gender and other outgroups to mount counter-majoritarian interventions. These symposia set an example that amounts to a challenge for, and ideally a beginning of, a multidimensional sexual orientation scholarship.

J. *Internalization & Self-Critical Awareness in Antisubordination Projects*

Practicing multidimensionality and strategic quasi-essentialism to balance diversity and solidarity in a majoritarian society may help legal scholars to galvanize social justice projects and discourses, but those efforts are not enough to sustain a long-term antisubordination struggle. As the Queer credo from above notes, appreciating and rejecting self-hatred is a key component of effective antisubordination struggle.[184] It must be similarly so for scholarship that seeks to advance antisubordination goals: not only must Queer and allied scholars refrain from assuming essentialist antisubordination affinity based on a commonality of disfavored identities, we also must refrain from assuming that experience with disfavored identity immunizes us from replicating essentialized identity-related biases. Rather, the sort of Queer, multidimensional scholarship envisioned here, and facilitated by this symposium and its counterpart, necessarily entails a firm resolution to spot and excise the operation of internal(ized) biases and essentialisms within our communities and ourselves. A threshold precaution therefore rises against the allowance or trivialization of essentialist prejudice in our midst, especially when it might serve to privilege us.

Social justice integrity requires self-awareness and self-critique because antisubordination scholars must resist social injustice both exter-

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181. *See supra* note 27 and accompanying text.

182. Without doubt, every article published in this symposium exudes a strong concern for sexual orientation justice.

183. In particular, the arguments advanced by Boyd, *supra* note 140, Cain, *supra* note 66, Ertman, *supra* note 61, and Franke *supra* note 53, pursue analyses that signal a multidimensional expansion of "sexual orientation" and justice.

184. *See supra* note 56 and accompanying text.

nally and internally.[185] We must avoid deploying existing or new structures of subordination; we must interrogate our possible redeployment of prejudice and privilege, including but not limited to situational redeployments that entail self-hate.[186] This proactive commitment to self-critical rejection of internal(ized) essentialist bigotry is a predicate for multidimensional analysis because internalized homophobia, racism, sexism and other forms of domination that depend on essentialized identities can blind our work to the ways in which these forces may hold sway over us. If we indulge injustices that we should cognize, we occlude in our minds the patterns of oppression that interconnect the social realities that we inhabit. Blinded, we may become unconsciously complicit in their operation within our immediate surroundings. We thereby disable our critical ability to practice multidimensionality effectively. In time we may bring into question the integrity of our antisubordination principles and practices.

By licensing through ignorance or laziness the operation of biases in ourselves and our midst, we sabotage our capacity for multidimensional analysis as a means toward critical coalitions with the potential to make a transformative difference in the lives of multiply diverse sexual minorities. Consequently, to make the move from single-axis sexual orientation scholarship to multidimensional Queer critiques of subordination, we must investigate and resist the operation of Euro-heteropatriarchal biases not only throughout the United States and beyond, *but within our communities and selves*.[187] This effort, in turn, requires acknowledgement of legal scholarship's place and power in this society, and of the responsibility that antisubordination legal scholars thereby cannot avert.

K. *Politics, Scholarship & Responsibility in Social Justice Struggle*

Because material transformation through just laws and lawmaking is the purpose of antisubordination legal scholarship, substantive social justice in the everyday life of a multicultural nation is the measure of our work's success:[188] being conscious of purpose, antisubordination scholarship on sexual orientation or other identity categories cannot be oblivious to effect.[189] For critical legal scholarship on sexual orientation to be rele-

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185. *See* Margaret E. Montoya, *Academic Mestizaje: Re/Producing Clinical Teaching and Re/Framing Wills as Latina Praxis*, 2 HARV. LATINO L. REV. 349, 351 (1997) (arguing that LatCrit academic discourse should include self-critique).

186. *See* Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color*, 2 HARV. LATINO L. REV. 495, 495, 499 (1997) (arguing that greater understanding of intergroup prejudice is a necessary precursor to developing an interracial jurisprudence).

187. *See* Iglesias & Valdes, *supra* note 162, at 1138, 1141–42.

188. *See* Lawrence, *supra* note 17, at 847 (suggesting the promise of antisubordination scholarship lies in the possibility of renewing the vision of America as a nation strengthened by its diversity and of "American life as a struggle for inclusion and belonging").

189. *See, e.g.*, Sumi K. Cho, *Essential Politics*, 2 HARV. LATINO L. REV. 433, 455 (1997) (arguing that scholars should assess the "political impact" of our work); Culp, *supra* note 155, at 482

vant in the lives of multiply diverse sexual minorities, our work therefore must be not only responsive to the material conditions of oppression that shape Queer life, but also must be causative in a majoritarian lawmaking order. Thus, even though progress may be incremental and even ephemeral—secured, if at all, in fragments—the fundamental question for antisubordination legal scholars always is whether our work consciously gauges the social justice effects that it can, or may help to, materialize.

To be purposeful and effective, the scholarship begun in these twin symposia must not shy away from political consciousness and social responsibility. Although multiply diverse antisubordination scholars may arrive at varied views on any particular point—and even on fundamental proposals—we always should be alert to the politics and effects of legal scholarship. This vigilance is especially valuable when our work is conceived and received as part of a continuing struggle for social justice. We must, in short, accept responsibility for the purpose *and* effects of our scholarship—even though social justice purpose in legal scholarship sometimes is viewed, especially (but not surprisingly) among majoritarian circles—as being inherently at odds with scholarly investigation.

According to that view, the "political" can never be the "scholarly" because the former is partisan and the latter objective.[190] Under that view, the scholar remains superficially oblivious to, and effectively never responsible for, the society that her work helps to conceive, conduce, justify and consolidate. It is a view that legitimates "scholarly" disclaimers of responsibility and fosters a smug sense of academic immunity from social accountability.

It also is a view with historical and renewed resonance, as the record of critical race theory has shown in recent years: exhibiting a sharp political awareness since its founding, critical race theory has been smeared by those among the already-privileged who cling to the convenient notion that scholarly dedication aimed toward social justice can be devalued to a mere subjectivity, while scholarly detachment that hovers above social injustice can be elevated to a grand objectivity.[191] Such attacks

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(stressing that outsider scholars must work together to imagine reforms that avoid replication of hierarchy).

190. This topic of course touches on the question of "objectivity" or "neutrality" in legal culture, which has a long and contentious history that is beyond the scope of this Afterword. *See generally* Valdes, *supra* note 3, at 126 n.333 (listing sources that deal with impartiality and neutrality in legal principles). The limited point advanced here is that legal scholarship, in particular, has political impact, and that this impact cannot be denied by simple disavowal or complacent detachment. The inevitability of impact has prompted one social justice scholar to call for "political impact determinations" in antisubordination legal scholarship. Cho, *supra* note 189, at 434.

191. This attack has focused chiefly on the use of narrative in critical race theory, which is decried by some uncritical or mainstream observers as a lesser method of scholarship in part because it is viewed by them as less "objective" or "neutral" in its recounting of social or legal experience than traditional preferences would permit. *See generally* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 809 (1993) (conceding

hinge and insist on a peevish formulation of "scholarship" that, as applied to the field of law in a legalistic society, is unconscionable: in a society where law is promised to justice, and where society maintains itself through the use of law while professing its justice, the study of law cannot long pretend detachment from the project of social justice through law. In a society that denominates majoritarian and "democratic" lawmaking as the only definitive formal mechanism for processing conflicts over "competing" values or interests, the study of law cannot avoid implication in the social and material consequences that law produces through its decisive, if not definitive, participation in such conflicts.[192] The political power and social responsibility of *all* legal scholarship, though sometimes still denied from above, really is beyond credible doubt.

Indeed, the existence and maintenance of a prestigious and comfortable legal academy is a patent and longstanding recognition that our work—including our scholarship—does matter. Our work, and especially our scholarship, matters because it helps, first, to create and disseminate conceptual frameworks for understanding social phenomena, and, then, to influence the formulation of public policy and legal regimes that, for better or worse, respond to and help to re/shape such phenomena. Our work matters because, incrementally but cumulatively, it helps to construct the social and material reality of this nation. Thus, there is no such thing as "scholarly" detachment. There is only social responsibility.

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that storytelling can contribute to legal scholarship, but insisting that the stories must be accurate and typical and should include an analytic dimension); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1749 (1989) (arguing that minority scholars "fail to support persuasively their claims of racial exclusion or . . . [that they] produce a racially distinctive brand of valuable scholarship"). These attacks have inspired spirited responses from scholars identified with critical race theory, feminist legal theory, critical race feminism, and Queer legal theory. *See, e.g.*, Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 256 (1994) (defending storytelling against the "sudden, and rather vehement, resistance" to its effectiveness and use); Colloquy, *Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990) (setting forth critical and other views); Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 543 (1991) (discussing the use of autobiography by blacks in law teaching to illuminate both scholarship and racial justice); Richard Delgado, *When a Story Is Just a Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 111 (1990) (noting criticisms of outsider scholarship and scholarship itself, and weighing how to help society deal with its racial problems); Marc A. Fajer, *Authority, Credibility, and Pre-Understanding: A Defense of Outsider Narratives in Legal Scholarship*, 82 GEO. L.J. 1845, 1846 (1994) (discussing how credibility concerns about the storyteller can be misplaced in outsider narratives); Alex M. Johnson, Jr., *Defending the Use of Narrative and Giving Content to the Voice of Color: Rejecting the Imposition of Process Theory in Legal Scholarship*, 79 IOWA L. REV. 803, 809 (1994). These responses likewise have elicited further replies from the skeptics. *See, e.g.*, Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647, 650 (1994) (expressing concern over a perceived tendency to subject "objective" legal scholarship to the demands of politics which will advance only the interests or perspectives of a particular community).

192. *See supra* notes 100–38 and accompanying text.

Of course, this defense of social relevance and responsibility is neither a call nor an excuse for scholarly sloppiness in legal discourse.[193] Relevance and responsibility do not entail any acquiescence to a less rigorous production of socially relevant legal knowledge; this point has been made by the impressive record of outsider or perspective jurisprudence produced to date.[194] Indeed, sloppy legal scholarship can result from complacent social insulation as much as from fierce social commitment. This call for critical consciousness about purpose and effect also does not invite conformist agreement among outgroup approaches to social justice. Conformity, like sloppiness, can come from many sources.[195]

Instead, scholarly acknowledgment and acceptance of responsibility for the social effects of legal scholarship merely—but crucially—shifts the values and paradigms for the production of scholarship. This shift tilts the enterprise toward a greater concern for, and involvement with, social justice through lawmaking.[196] It is a shift amply counseled for legal scholars by the centrality of law to substantive social reformation within this legalistic society.[197] It is a shift made imperative by the majoritarian campaigns of today's cultural war, which focuses on lawmaking processes to reclaim and re-impose traditionalist cultural superiority as a matter of formal law.[198]

Thus, by looking the other way—by seeking to ignore the foreseeable effects of our disengagement with the everyday lives of those whom the law slights—legal scholars effectively take sides with the privileged

193. On the contrary, outsider status counsels self-critical awareness among antisubordination legal theorists. *See* Iglesias & Valdes, *supra* note 162, at 583.

194. This record includes the gains since 1979 of sexual orientation legal scholarship as well as the gains of other outsider discourses, including feminist legal theory, critical race theory and LatCrit theory. *See supra* notes 25–27 and 35–52 and accompanying text; *see also* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 11–12 (1995) (noting the evolution of new "perspective" scholarship that is built on the study of relevant differences among people).

195. Additionally, there is nothing inherently incompatible between antisubordination purpose and legal scholarship in a heterogeneous society formally and emphatically devoted to social justice and harmony through law. *See supra* note 11 and accompanying text. On the contrary, in such a society it would seem that critical fidelity to basic legal principles and national ideals would be a beneficial characteristic of legal scholarship. Moreover, this benefit would increase if the legal principles or national ideals in question had been formalized as a matter of law yet remained aspirational as a social matter—in this case, the legal scholar could, and should, aid the nation in operationalizing, thereby realizing the integrity of, its professed principles and ideals. *See generally supra* note 150 and sources cited therein. Because these conditions describe the American status quo, legal scholarship with antisubordination consciousness and conscience is not only a legitimate and valuable discursive enterprise, it is a compelling social need. *See generally supra* notes 154–61 and sources cited therein.

196. *See generally* Culp, *supra* note 191, at 546–47 (explaining how personal identity may connect group experiences with the law study); Lawrence, *supra* note 23 (theorizing how antisubordination purpose and method are interwoven in teaching, scholarship and community).

197. *See supra* Part B.

198. *See supra* Parts D, E.

and powerful who prefer to sustain a status quo that favors them at the expense of others.[199] In the current context of cultural war, this election may comport to majoritarian self-interest, but not to antisubordination purpose. By "letting the chips fall where *they* may," rather than by noting where and how *we* choose to throw *our* chips, legal scholars may seek to disavow the ripple effects that we (should) know our work generates. But by acknowledging the political nature and effects of our work, legal scholars self-consciously and self-critically assume responsibility for the causative power that our positions of (limited but significant) influence accord to us as members of this nation's privileged legal academy. By joining antisubordination purpose with multidimensional analysis, the nascent field of Queer legal theory heralded by the two intersexionality symposia of 1997 can help to ensure that public discourse and legal reforms on "sexual orientation" will be socially grounded, socially relevant and socially responsible.

CONCLUSION

Now, and the next several years, are a critical time for sexual orientation legal scholars. Through our combined work we can show ourselves able to develop the kind of multidimensional, antisubordination legal discourse on sexual orientation that this symposium and its counterpart invite. Doing so will require us to expand our intellectual and political horizons. Not doing so will hamper our social justice efforts, qualifying both the equality principles that we profess to uphold, and the transformative aims that we seek to advance, through our work. For me—as for the authors and editors of this symposium and its counterpart—the better choice seems clear.

It thus is a happy coincidence that in 1997 not one, but two, unprecedented symposia on sexual orientation and intersectionality—or "intersexionality"—were conceived and planned independently of each other by the editors and advisors of two law reviews. By framing the symposia in this manner, the *Denver University Law Review*[200] and its counterpart in this serendipity, the *Hastings Law Review*,[201] have marked 1997 as the

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199. This "passive" partisanship, buttressing ingroup domination of law and society, is precisely the pose of formal, official impartiality urged by majoritarian warriors that espouse ingroup prerogatives through backlash lawmaking: "I think it no business of the courts . . . to take sides in this culture war," dissented Justice Scalia in *Romer v. Evans*. 517 U.S. 620, 636 (Scalia, J. dissenting); *see supra* notes 104, 131 (discussing the decision in *Romer*). Though this pose failed in *Romer*, it succeeded in *Bowers*. *See supra* note 14 (discussing the decision in *Bowers*). In these two instances, this pose has been urged directly for "objective" judges, but it dovetails and helps to legitimate the notion that "true" legal scholars are those who rise "objectively" above the ugliness of cultural war. In both instances, it seems to me, a key flaw (or, for ingroup elites, virtue) of this urging is that this pose relies on the assumption that the law and society produced via cultural warfare are segregatable from that phenomenon.

200. Symposium, *InterSEXionality*, *supra* note 4.

201. Symposium, *Intersexions*, *supra* note 4.

year in which sexual orientation scholarship entered the postmodern age in a programmatic, if only tentative, way.

Of course, we cannot tell now where these symposia ultimately will lead. Nor can we tell whether our scholarship ever will be enough to counter the sweep of majoritarian essentialism and cultural backlash. But hopefully, the coincidence of the two 1997 symposia is a harbinger of a coming expansion in the scope, depth and power of sexual orientation legal scholarship as a form of social justice practice; hopefully, one day a future generation of legal scholars will look back on this year, and on these symposia, as the commencement of a second, more expansive and enduring, wave of legal scholarship on sexual orientation. To help hasten that day's arrival, this Afterword urges today's legal scholars to become cultural warriors by adopting and extending in sexual orientation discourse the techniques and tools of multidimensional analysis and praxis.